TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~332.~~ 132

THE HOME INSURANCE COMPANY OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ELIAS R. BARTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 5, 1870.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1870.

ELIAS R. BARTON ET AL., PLAINTIFFS,
ag'st
THE HOME INSURANCE CO., DEFENDANT.

Removed from Saline County circuit court.

Be it remembered that, heretofore, to wit, on the twenty-fourth day of June, A. D. 1869, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri, the following transcript from the circuit court of Saline County, Missouri, to wit:

In the Saline County circuit court. In vacation.

STATE OF MISSOURI,
County of Saline, sct:

On the 17th day of October, A. D. 1868, and in the vacation of the Saline County circuit court, there was filed in the office of the clerk of said court the following transcript of the records and proceedings, as certified from the Howard County circuit court, in a cause wherein Barton and Hutchinson were plaintiffs, and the Home Insurance Company was defendant, to wit:

In the Howard County circuit court.

STATE OF MISSOURI,
County of Howard, sct:

Among other proceedings had in said court were the following,
2 to wit:

On the 24th day of August, 1865, the following petition was filed, which is in words and figures as follows, to wit:

Petition.

In the Howard County circuit court, December term, 1865.

STATE OF MISSOURI,
County of Howard, ss:

ELIAS R. BARTON AND SOLOMON C. HUTCHISON,
plaintiffs,
against
THE HOME INSURANCE COMPANY, DEFENDANT.

The plaintiffs state that they were, at the several times hereinafter stated, and still are, partners under the style and firm-name of Barton & Co.; and the plaintiffs further state that the defendant is, and was at the several times hereinafter mentioned, a corporation created by a law of the State of New York, with power to insure hemp and other property from loss or damage by fire, and to contract and be contracted with, and to sue and be sued, & to execute and issue policies of insur-

ance. And the plaintiffs further state that the said defendant, under the laws of the State of Missouri, established agencies to transact their business in the State of Missouri, and for this purpose appointed Thomson Lewis & Co. their agents at Glasgow, in the county of Howard and State of Missouri, & who are still their agents, and appointed Mack & Brawner, of the city of St. Louis, & State of Missouri, their chief agents, located at St. Louis aforesaid, and now acting as their agents under the laws of the State of Missouri.

The plaintiffs further state that the defendant heretofore, to wit, on the 24th day of August, in the year of our Lord eighteen hundred and sixty-four, made, executed, and delivered to the plaintiffs their certain policy of insurance in writing, of the date last aforesaid, signed by their Secretary and President, and countersigned by said Thomson Lewis & Co., agents of said defendant, at Glasgow aforesaid, who, for and in behalf of the defendant, delivered said policy of insurance thus executed to the plaintiffs, and which said policy of insurance is
3 herewith filed as an exhibit, and as part of this petition, (marked A,) by which said policy of insurance the said defendant, in consideration of the sum of one hundred and twenty-five dollars to them paid by the plaintiffs, did insure the plaintiffs against loss or damage by fire to the amount ten thousand dollars for the term of three months from the 25th day of August, in the year of our Lord 1864, at 12 o'clock, noon, to the 25th day of November, in the year of our Lord 1864, at 12 o'clock, noon, on hemp of said plaintiffs stored in a certain one-story frame building belonging to B. W. Lewis, fronting and immediately on the Mo. River, just above Bear Creek, in Chariton County, in the State of Missouri, by which said policy of insurance the said defendant, for the consideration aforesaid, did promise and agree to make good unto the plaintiffs, their executors, administrators, or assigns, all such loss or damage not exceeding in amount the said sum of ten thousand dollars, as should happen by fire to the property, as above specified, during three months, to wit, from the 25th day of August, in the year of our Lord one thousand eight hundred and sixty-four, at 12 o'clock, at noon, until the 25th day of November, in the year of our Lord one thousand eight hundred and sixty-four, at 12 o'clock at noon, the said loss to be estimated according to the actual cash value of the said property at the time the same should happen, and to be paid within sixty days after due notice and proof thereof made by the insured in conformity to the conditions annexed to said policy, unless the property should be replaced by similar property of equal value and goodness. And it was provided by said policy, and thereby declared, that said corporation (the defendant) should not be liable to make good any loss or damage by fire which might happen by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, or any loss by theft at or after a fire; and it was also further provided in & by said policy that, if any other insurance had been or should thereafter be made upon the said property, and not consented to by said defendant in writing thereon, or if said property should be sold or conveyed, or the interest of the parties therein changed, or if said
4 policy should be assigned without the consent of the defendant, obtained in writing thereon, or if the insured should make any attempt to defraud the defendant, then & in every such case the policy should be null & void; (by the terms of said policy notice of other insurance, should any be made, was waived;) and plaintiffs aver that no other insurance had been or was made on said hemp. It was also provided, by said policy, that the insured, in case of loss, should not be

entitled to demand or recover, on said policy, any greater proportion of the loss or damage sustained to the subject insured than the amount thereby insured should bear to the whole amount insured on said property; but plaintiffs aver that no other insurance had been or was made thereon. And it was also agreed and declared to be the true intent and meaning of the parties to said policy of insurance that, in case the above-mentioned premises at any time during the period for which said policy would otherwise continue in force, should be used for the purpose of carrying on therein any trade or vocation, or for storing and keeping therein any articles, goods, or merchandise denominated hazardous, extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to said policy, except as therein specially provided for, or thereafter agreed to in writing in said policy, by said corporation from thenceforth, so long as the same should be so used, the said policy should be of no force or effect. And it was moreover agreed and declared by said policy that, whenever gunpowder, phosphorous, saltpetre or any other article subject to legal restriction should be kept on said premises in quantities greater than the law allows, or in a manner different than that provided by law, unless said use or keeping was specially provided for therein, the said policy should be null and void. Petroleum and earth oil in a crude or unrefined state were, by said policy, declared to be insurable, and the keeping or storage of the same in the insured premises should also render the said policy null and void. And it was further provided that said policy was made and accepted in reference to the terms and conditions therein contained and thereto annexed, and they were thereby declared to be a part of said contract, and to be used and resorted to in order to determine the rights and obligations of the parties thereto in all cases not therein otherwise specially provided for.

And plaintiffs further state that the conditions of insurance referred to in said policy and annexed thereto, read in the following words and figures to wit:

1st. Applications for insurance on property must be in writing, and must specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether *in* manufacturing is carried on within or about it; and, relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken, and deemed to be a part and portion of the policy issued thereon and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or, if, during the existence of this policy or any renewal thereof, the risk shall be increased by any means within the control of the insured, or by the occupation of the premises for more hazardous purposes than are permitted by this policy, or if the assured, at or before the taking of any renewal, shall fail to notify the company of any insurance of the hazard, whether within or without the premises, and have the same endorsed hereon, this policy shall be void. Every renewal shall be deemed to be made on the faith of the representations on which the original policy was granted, unless superseded by a new description of the risk.

3. This insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short

rates, for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect, and refunding *at* ratable proportion of the premium for the unexpired term of the policy.

6 4. If the property to be insured be held in trust, or on commission, or be a leasehold, or *or* other interest not absolute, it must be so represented to the company, and expressed in the policy, in writing, otherwise the insurance, as to such property, shall be void; and, in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, with their respective interests therein. Goods held *in* storage must be seperately and specifically insured.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. If, at the happening of any fire, the insured shall have insurance under a floating policy, or policies not specific, but covering goods generally, in various places not designated and yet within the limits which include the premises or property herein insured, such policy, as between the insured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess.

7. In case of claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

8. In case of fire, or loss, or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they shall fail to do so, this company shall not be held liable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood that there can be no abandonment to the insurers of the subject insured.

9. Persons sustaining loss or damage by fire shall forwith give
7 notice thereof, in writing, to the company or its agent; and, as soon after as possible, they shall deliver as particular account of their loss and damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just, showing also the ownership of the property insured, what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner, (as to trade, manufacturing, merchandise, or otherwise,) the building insured or containing the subject insured and the several parts thereof were occupied at the time of the loss; and who were the occupants of such building; and when and how the fire originated, so far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor, or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damages alleged, and that he is acquainted with the character and circumstances of the insured or claimant; and that he verily believes that he,

she, or they have, by misfortune and without fraud or evil practice, sustained loss or damage on the subject insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify. When merchandise or other personal property is damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause a list or inventory to be made and furnished to the company of the whole, naming the quantity and cost of each. The amount of sound value and of damage may then be ascertained by the examination and appraisal
8 of each article by disinterested appraisers mutually agreed upon, one half of the appraisers' fees to be paid by insurers. And the insured shall, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or their claim thereupon, and subscribe such examination, the same being reduced to writing. And whenever required in writing, the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid, or destroyed, and shall also exhibit to any person named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy; and until such proofs, declarations, and certificates are produced, and such appraisals and examination of property permitted by the claimant, the loss shall not be payable. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

10. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take the goods at their appraised value, or to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators, indifferently chosen, whose award, in writing, as to the amount of such loss and damage shall be binding on the parties,
9 but such award shall not determine any question as to the liability of this company under this policy.

11. When property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

12. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect, or of deviation from the laws or regulations of police made to prevent accidents from fire in places where laws and regulations on this subject exist.

13. It is furthermore hereby expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of

law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against said company, after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

And plaintiffs further state that they had, on the seventeenth day of October, in the year of our Lord 1864, hemp stored in said one-story frame building, which said hemp belonged to the plaintiffs, and was of the actual cash value of more than ten thousand dollars, and was covered by said policy of insurance; and the said hemp was, on the day and year last aforesaid, totally consumed and burned up by fire, which said fire did not happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and the said plaintiffs did suffer loss in the burning of their said hemp to the amount of more than ten thousand dollars, whereby and by means of the premises the defendants became liable to make good to said plaintiffs their said loss, to the amount of ten thousand dollars as aforesaid. And the said plaintiffs aver that they gave to the defendant due notice of said loss by fire in accordance with the said policy, and made out and filed with the agents of said defendant at St. Louis aforesaid, proofs of their said loss according to the terms of said policy; and plaintiffs state that they had no other insurance & have made no other insurance on said property; and the plaintiffs further state that they duly performed all the conditions and stipulations in said policy on their part to be performed; and plaintiffs state that the defendant has wholly neglected and refused to perform the stipulations and conditions in said policy on their part to be performed; and wholly refused, although requested so to do, to adjust the plaintiff's loss, and refused to pay the same when applied to, and refused to agree to pay the same at the end of sixty days after the proofs, &c., were made as aforesaid, or at any other time, nor have they replaced or offered to replace the said hemp by hem' of equal value and goodness, or in any manner whatever to pay the plaintiffs their said loss and damage; but, on the contrary thereof, wholly neglect and refuse to pay the plaintiffs their said loss and damage, whereby and by means of the premises the plaintiffs say they are injured, and an action hath accrued to them to have and demand of the *plaintiffs* the sum of ten thousand dollars together with interest thereon at six per centum per annum from the said seventeenth day of October, 1864, for which said sum of ten thousand dollars and the interest they ask judgement, & for such other relief as they are entitled to.

ADAMS & SHACKELFORD,
Att'ys for Plaintiff.

S. C. Hutchison, one of the plaintiffs, being duly sworn, says that he believes the foregoing petition and the matters therein as stated, are true.

S. C. HUTCHISON.

Subscribed and sworn to before me this 22nd August, A. D. 1865.
Witness my hand and official seal.
[L. S.]

T. SHACKELFORD,
Notary Public, Howard Co., Mo.

11 *Writ.*

(Copy of writ issued in said petition.)

STATE OF MISSOURI,
County of Howard, sct:

The State of Missouri, to the sheriff of Howard County, greeting:

We command you to summon the Home Insurance Company to be and appear before the judge of the Howard circuit court at Fayette, in Howard County, on the first day of December next and answer the foregoing petition of Elias R. Barton & Solomon C. Hutchison, plaintiffs, and have you then and there this writ.

Witness, Cha's H. Stewart, clerk of said court under the seal thereof at office in Fayette, on the 31st day of August, 1865.

[L. S.] C. H. STEWART,
Clerk.

Return.

Return of sheriff of said writ.

I hereby certify that I executed the within petition and writ by delivering a true copy of the petition and writ to James S. Thomson, and a copy of the writ to Charles H. Lewis, the agents of the within-named insurance company in Howard County, Missouri, this 31st day of August, A. D. 1865.

P. M. JACKSON,
Sh'ff of H. C.

And afterwards, to wit, on the 6th Dec., 1865, the following order was made:

Order granting leave to file ans.

BARTON & HUTCHISON
vs.
THE HOME INSURANCE COMPANY. } Civ. act.

The defendant has leave to file answer in ninety days, and is to furnish copy of same to plaintiff and this cause is continued.

And afterwards, to wit, on the 17th day of February, 1866, the following answer was filed in vacation, which answer is in the following words & figures, to wit:

Answer.

In the Howard circuit court, Dec. term, 1865.

STATE OF MISSOURI,
County of Howard ss:

ELIAS A. BARTON AND SOLOMON C. HUTCHISON, plaintiffs,
against.
THE HOME INSURANCE COMPANY, DEFENDANT.

12 The defendant, by its attorney, comes and for answer to so much of plaintiffs' petition as is deemed material and necessary for de-

fendant to answer, states that it is true defendant, on the 24th day of August, A. D. 1864, made, executed, and delivered to the plaintiff, the policy of insurance mentioned and described in their petition, and defendant admits that, by the terms of said policy of insurance, and in consideration of the sum of one hundred and twenty-five dollars paid by plaintiffs to defendant, that defendant did insure the plaintiffs against loss or damage by fire to the amount of ten thousand dollars, for the term of three months, on hemp, which was represented by plaintiffs as belonging to themselves, but defendant says as to whether said hemp, at the date of said policy, or at any other time. belonged to the plaintiffs, defendant has no knowledge or information sufficient to form a belief. Defendant admits that, for the consideration aforesaid, defendant did agree with plaintiffs, their executors, administrators, or assigns to make good all such loss or damage not exceeding in amount the said sum of ten thousand dollars, as should happen by fire to the property or hemp mentioned in plaintiffs' petition during three months, to wit: from the 25th day of August, in the year of our Lord 1864, at 12 o'clock at noon, until the 25th day of November, 1864, at 12 o'clock at noon, but it was expressly provided by said policy, and thereby declared that said debt should not be liable to make good any loss or damage by fire which might happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; and such was the true intent and meaning of the parties to said policy of insurance. Defendant denies that the plaintiffs, on the 17th day of October, 1864, had stored in the one-story frame building mentioned in the petition, hemp of the actual cash value of more than ten thousand dollars, and defendant denies that the plaintiffs, on the day and year last aforesaid, were the owners of ten thousand dollars' worth of hemp, and that the same was covered by the said
13 policy of insurance as stated by the pl'ffs.

And defendant, further answering, *say* that if the plaintiffs, on the said 17th day of October, 1864, owned any hemp, and the same was totally consumed and burned up by fire, this defendant is in no wise responsible therefor.

And the defendant, further answering, *say* that the said hemp in the said petition mentioned and therein supposed to have been burnt, consumed, lost, and destroyed by fire, was not, nor any part thereof, burnt, consumed, lost, or destroyed by fire in manner and form as the said plaintiffs hath in said petition alleged.

And defendant, further answering, *say* that heretofore, to wit, in the month of October, 1864, this State was invaded by an army of rebel soldiers under the command of Maj. Gen. Sterling Price, and that a large body of rebel troops, being a part of said invading force, entered the county of Howard, under the immediate command of Gen'l John B. Clark, jr., and captured the city of Glasgow, the place at which the alleged fire occurred, and took military possession of the same, on the 17th day of October, 1864, the time at which plaintiffs allege they sustained their loss. And defendant says and so charges the fact to be, that if any part of said hemp was consumed and burnt up by fire, the same was consumed and burnt up by means of said invasion, and defendant avers that said fire happened by means of said invasion or by military or usurped power, and defendant says that if plaintiffs did suffer any loss in the burning of said hemp, said loss is not covered by its policy, and defendant is not responsible therefor. And defendant denies that it is liable to make good to pl'ff their loss to the amount of ten thousand dollars or any other sum or amount whatever.

And defendant, now having fully answered, prays to be dismissed with its costs.

STEPHENS & DRAFFEN, CLARK & COCKRILL,
Att'ys for Def't.

Henry C. Temple, agent for defendant, makes oath and says the foregoing petition and the matters therein, as stated, he believes to be true.

HENRY C. TEMPLE.

Subscribed and sworn to before me this 3d day of January, 1866.

H. CLAY COCKRILL,
Notary Public.

And afterwards, to wit, on the 5th June, 1866, the following order was made.

14 *Mo. to strike out part of def't's answer filed.*

BARTON & HUTCHISON
vs.
THE HOME INSURANCE COMPANY. } Civ. act.

Now, at this day come the plaintiffs, by their attorney, and file their motion to strike out part of defendant's answer.

Which motion is in the following words and figures, to wit:

Motion.

In the Howard circuit court, June term 1866.

ELIAS R. BARTON ET AL.
vs.
THE HOME MUTUAL INSURANCE COMPANY. }

The *defendants* moves the court to strike out all that part of the defendant's answer, where it is set up that the fire, by which plaintiff's hemp was consumed, happened by means of invasion, *and by means of invasion* or by military or usurped power, and all those parts of said answer referring to the mode and manner in which said fire occurred.

1st. Because the said parts of said answer set up multifarious and inconsistent defences.

2nd. Because said parts of said answer sets up inconsistent matters in avoidance; whereas, by the same answer, the defendant denies that the plaintiffs were the owners of the hemp consumed by the fire, & denies that the said hemp was covered by the policy of insurance, because of the alleged want of property in the plaintiff.

3d. Because said parts of said answer are too general and indefinite.

4th. Because the said answer is otherwise defective, and said parts of said answer are irrelevant, and constitute no defence to plaintiff's petition.

ADAMS & SHACKELFORD,
For Pl'ffs, with A. J. Herndon.

Afterwards, to wit, on the 6th day of June, 1866, the following order was made, to wit:

Order sust'g mo. to strike out p'ts of ans.

BARTON & HUTCHISON, PLAINTIFFS,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT. } Civ. act.

The motion, heretofore filed by plaintiff's attorney, to strike out in this cause part of defendant's answer being seen and heard by the court, and by the court fully understood, the same is sustained as to that part of said answer referring to the mode and manner in which said fire occurred.

Afterwards, on the 7th June, 1866, the following order was made in said court:

Order filing amended ans.

BARTON & HUTCHISON, PLAINTIFFS,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT. } Civ. act.

Now at this day comes the defendant, by its attorney, and files an amended answer in this cause, which amended answer is in the following words and figures, to wit:

Amended answer.

In the circuit court of Howard County, Missouri, June term, 1866.

ELIAS R. BARTON & SOLOMON C. HUTCHISON,
plaintiffs,
against
THE HOME INSURANCE COMPANY.

The defendant, by way of amendment to the answer originally filed herein, states and admits that defendant made and executed to plaintiffs at the time, and upon the terms and conditions as stated in the petition, the contract or policy of insurance sued on. The defendant admits that the property, insured by said contract or policy of insurance, was burnt and destroyed by fire at the time stated in the petition; but denies that defendant is liable to make good the loss sustained by plaintiffs by reason of the destruction of said property by fire. The defendant, further answering, states that it was, and is, provided in said policy or contract of insurance, that defendant should not be made liable or be liable to make good to plaintiffs any loss or damage by fire to said property that might take place by means of any invasion, insurrection, riot, or *or* civil commotion, or of any military or usurped power, or any loss by theft at or after such fire. And defendant denies that it is true, as charged and alleged in and by said petition, that said property, insured as aforesaid, and destroyed and consumed by fire, was not consumed and destroyed by means, or did not happen and take place, by means of invasion, insurrection, riot, or civil commotion or of any military or usurped power, for the defendant avers and states the fact to be that said property was consumed and destroyed by fire, which fire happened and took place, as defendant believes, by means, either of invasion, insurrection, riot, or civil commotion or of military or usurped power, but that defend-

16 ant does not know and is ignorant whether said fire happened or took place either by the one or the other of the means aforesaid. The defendant states that, in the month of October, 1864, a large body of rebel soldiers & armed men, amounting to several thousand, unlawfully and with force and arms came into the State of Missouri, (who, after their entrance into this State, were joined by others,) with the intent and for the purpose by force and arms to overthrow the laws of the United States, and of the State of Missouri, and to capture and take prisoners the soldiers of the United States, then being in this State, and to *to* seize and destroy the stores and public property of the said United States & of this State, and also of the citizens of this State; that said body of men and those joining them as aforesaid, acting in concert with each other, seperated into smaller bodies for the purposes aforesaid; and that one of these bodies of men & rebel soldiers on the 15th day of October, 1864, unlawfully and for the purpose of general mischief, and the capture, and destruction, and injury of the persons and property of the citizens of the United States and this State, and unlawfully, and to carry out and accomplish their said unlawful purposes, went to, met, and assembl*i*ed in the city of Glasgow, in the county of Howard, and forcibly took possession of said city, and of the warehouse in which the hemp of said plaintiffs was then stored, near to said city of Glasgow, and retained possession and occupation of the same, until late in the evening of the 17th day of October, 1864, and being so in the possession of said city, and warehouse, and hemp of plaintiffs therein stored, unlawfully, riotously, by force and violence, did set fire to and destroy said warehouse and the hemp of plaintiffs therein contained.

The defendant, further answering, states and avers that defendant does not *known*, nor has defendant sufficient knowledge or information thereof, from which to form a belief, as to whether said hemp or property was, at the time it was destroyed by fire, worth or was of the value of ten thousand dollars. Defendant denies that the plaintiffs are entitled to a judgement against defendant for the sum of ten thousand dollars and interest thereon, as prayed for by them or for judgment against defendant for any amount or sum whatever, by reason of anything alleged by them in *his* said petition.

CLARK & COCKRILL & DRAFFEN & MUIR,
Att'ys for Defendant.

17 James A. Clark, attorney for defendant, makes oath and says the foregoing answer and the matters therein as stated he believes are true.

JAMES A. CLARK.

Subscribed and sworn to before me on this 7th day of June, 1866.
C. H. STEWART, *Clk.*
By J. M. REID, *D. C.*

And afterwards, on the 6th June, 1867, the following proceedings were had in said court, to wit:

Judgement.

ELIAS R. BARTON & SOLOMON C. HUTCHISON, plaintiffs,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT. } Civ. act.

Now, at this day come the parties aforesaid, by their *attorney*, and

also the following jury, to wit, William Tippett, George W. Bradley, Benjamin R. Patrick, Richard S. Patton, Solon Smith, Talton Morris, Thomas J. Whitton, John Lee, Thompson Feland, George W. Drake, John W. Cloyd, and Mathew Mullins, twelve good and lawful men of the body of the county of Howard, who, after being duly elected, tried, and sworn to well and truly try the cause, and, after hearing part of the evidence, were by the court discharged until to-morrow morning.

And afterwards, on the 7th June, 1867, the following was had, to wit:

ELIAS R. BARTON & SOLOMON C. HUTCHISON, plaintiffs,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT. } Civ. act.

Now, on this day come again the parties, by their attorneys, whereupon came again the said jury, to wit, William Tippett, George W. Bradley, Benjamin R. Patrick, Richard S. Patton, Solon Smith, Talton Morris, Thomas J. Whitton, John Lee, Thompson Feland, George W. Drake, John W. Cloyd, and Mathew Mullins, twelve good and lawful men of the body of the county of Howard, who, after hearing the balance of the evidence and the arguments of the counsel, upon their oaths say:

"We, the jury, find for the plaintiffs eleven thousand four hundred and sixty dollars."

It is therefore considered by the court that the said plaintiffs recover of the said defendant the said sum of eleven thousand four hundred and sixty dollars, so by the jury found to be due, together with their costs and charges in this behalf laid out and expended, and that they have execution therefor. Int. 6 per cent.

Afterwards, on the 8th June, 1867, the following was had in said court, to wit:

18 *Order filing mo. for new trial & bill exceptions & affid't for app'l.*

ELIAS R. BARTON & SOLOMON C. HUTCHISON, plaintiffs,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT. } Civ. act.

Now, at this day comes the defendant, by its attorney, and files its motion for a new trial, which, having been seen and heard by the court, is overruled; whereupon the defendant files its bill of exceptions, which is signed & sealed by the court as part of the record. The defendant also files its affidavit for an appeal, which is granted by the court.

The motion for a new trial is in the following words and figures, to wit:

In the circuit court of Howard County, June term, 1867.

BARTON & HUTCHISON, PL'FFS,
vs.
HOME INSURANCE CO., DEF'TS.

Now, on this day the defendants, by *their* attorneys, come and move

the court to set aside the verdict and judgement rendered in this cause for the following reasons, and grant them a new trial:

1st. Because the court, at the instance of the plaintiffs, permitted illegal, irrelevant, and incompetent evidence to go to the jury.

2nd. Because the court improperly refused legal, competent, and material evidence to go to the jury, offered at the instance of the defendants.

3d. Because the court gave to the jury, at the instance of the plaintiffs, erroneous and illegal instructions, and refused to give to the jury, at the instance of defendants, legal and proper instructions.

4th. Because the court improperly and erroneously declared the law in the case.

5th. Because the court refused to declare the law, as asked by the defendants.

6th. Because the defendants, upon the evidence given, were entitled to a verdict.

7th. Because there is no evidence in the case to support the verdict.

CLARK, MUIR & DRAFFEN,
Att'ys for D'f'ts.

Affidavit for appeal filed.

Affidavit.

In the circuit court of Howard County, June term, 1867.

BARTON & HUTCHISON
vs.
HOME INSURANCE CO.

19 This affiant, for and in behalf of the defendants in the above-entitled cause, after having first been duly sworn, on oath states that the application for an appeal, on the part of the said defendants in this case, is not made for vexation or delay, but because this affiant believes that the appellants, The Home Insurance Company, are aggrieved by the judgement or decision of the court in said cause.

J. W. DRAFFEN.

Subscribed and sworn to before me June 8th, 1867.

C. H. STEWART, *Clk.*

Bond.—Copy of appeal bond.

In the circuit court of Howard County, Missouri, June term, 1867.

SOLOMON HUTCHISON & ELIAS BARTON, plaintiffs,
vs.
THE HOME INSURANCE COMPANY OF NEW York, defendant.

Whereas the defendant in the above-entitled cause has appealed from the judgement of the circuit court of Howard County, rendered herein against defendant at the June term, 1867, thereof: Now, therefore, know all men by these presents that J. L. Stephens, as principal for the said appellant, together with J. W. Draffen and W. D. Muir, as secu-

rities, acknowledge themselves to owe and stand indebted to the said Solomon Hutchison and Elias Barton (the said appellees) in the penal sum of twenty-four thousand dollars, for the payment of which they bind themselves, their heirs and administrators, &c.

The condition of the above obligation is this, that if the said appellant will prosecute *their* appeal with due diligence to a decision in the district court, (of the district in which Howard County is situate,) and shall perform such judgement as shall be given by the said district court, or by the supreme court, or such as the said district court or the supreme court may direct the circuit court to give, and if the judgement of such court, or any part thereof, be affirmed, that said appellant will comply with and perform the same, so far as it may be affirmed, and will pay all damages and costs which may be awarded against the appellant by the said district court or by the supreme court, then this obligation shall be void; otherwise to be and remain in full force and virtue.

Given under our hands and seals on this day of June, A. D. 1867.

J. L. STEVENS. [SEAL.]
J. W. DRAFFEN. [SEAL.]
W. D. MUIR. [SEAL.]

20 *Bill of exceptions.*

Copy of bill of exceptions filed, to wit:

BARTON & HUTCHISON
vs.
HOME INSURANCE CO.

Be it rem'bered that, on the 24th day of August, 1865, the plaintiff filed in the office of the circuit clerk of Howard County the following petition, (copied on pages 1 to 18, inclusive,) and on the 7th day of June, 1866, the defendant filed *their* amended answer to said petition, which is in the following words and figures, (copied on pages 25 to 28, inclusive;) and afterwards, to wit, on the 6th day of June, 1867, the case was submitted to a jury for trial, and the plaintiff' read in evidence the policy of insurance, and introduced the following witnesses, who testified as follows:

Plaintiffs' evidence.

JOHN P. LEBREE sworn, & states:

There is always a difference in the price of hemp, according to quality. In July & August, 1864, a fair article was worth $153 per ton. After that it got lower. In October it was worth a good deal less, say $125 p'r ton; a very inferior quality worth much less. The price I name was St. Louis prices. Worth $10 p'r ton to ship to St. Louis. A fair article worth $115 in Glasgow.

JACK RAWLINS (col'd) states:

I have been engaged in working in hemp 18 or 20 years; am a good judge of quality of hemp; was foreman for pl'ffs. Half the warehouse was occupied by the hemp; would judge there was 100 tons, & was picked hemp of good quality. Some of the hemp had been in the warehouse the best end of a year, say half of it. As we got hemp, we put

away the best for winter hackling. It was *bailed*; do not know how many *bails* there were. Had put a little hemp in the house 2 or 3 weeks before the fire. We were shipping hemp along through the fall; had shipped some a week or two before fire. John Digges hauled hemp usually from factory to warehouse. I attended to storing it in warehouse.

Policy read.

Here pl'ffs closed their evidence in chief, and the pl'ffs then closed their case.

D'f'ts evidence.

Whereupon the defendant offered the following witnesses:

Defendant's evidence.

ADDISON GRISHAM states:

Lives 5 or 6 miles from Glasgow; knew the frame warehouse; known as Lewis'; was there and saw the house burned; was 40 or 50 steps from it. There was great many men (confederate soldiers) around there; many of them were armed; some of them were citizens. A negro woman wanted to take a bed out of the house. A man
21 was there, and would not let her have it. He said he had orders not to let any one go in or out of the warehouse, & he did not intend to do it. Another one said, let her have it, as it might get burned up, and kicked it out. This man, who refused to let the woman take the bed, was armed. I was stopped in the neighborhood of warehouse with my wife. They told me not to go further, as a battle was expected up town. They took my wagons from me, and in 15 or 20 minutes saw the house on fire. Wind was blowing very hard. There was camp-fires some 15 feet off from warehouse. Not more than ¼ hour from the time the woman wanted bed before the house got a-fire—not more, at any rate, than a ½ hour. I was not there more than ¾ hour. The confederate soldiers crossed the river. When I left, all had not crossed. The guard said his orders were not to let anything go out of the house. Less than ½ hour after this fire started, there was fire 10 f't from door of warehouse. No one, except some women, were allowed to go in; they were allowed to go in and set down. The man who kicked out the bed had on short coat, with yellow stripes on the arm. The guard did not say more after this one said let her have the bed. It was about 12 or 1 o'clock. I was taken out of my wagon at the warehouse. I was *quite much* excited among the soldiers all around me. The wind blowed across the road; the wind came from the southwest. I do not know of seeing but one or two citizens of Glasgow there. This was on Monday that fire occurred. The battle was on Saturday before. No effort was made to put out fire by any one. The reason I did not try to put it out, it was not my business, though I did not want to see a house burned. It was soldiers who ordered me out my wagon & took the blankets. The soldiers were crossing the river in steamboat. The army had brought the s'b' from Boonville. I saw only one man I knew belonged to confederate army. Did not see carriages, &c., passing. Saw smoke rise from s'boat, which they said burning. The steamboat and warehouse burned at same time. One man stood at door; others passed about; let no man go in; camp-fire was between river and door; was straw scattered around door. Wind was blowing in at

the door, opposite river, which was open. There was fire at north end of house. I heard no interruption with anybody whatever.

MARTIN GREEN states:

Know nothing of origin of fire; child called my attention to the
22 smoke; fire occurred ½ past 10 o'clock; heard noise at that time; there were persons passing and around there; could not see warehouse; I was wounded in the fight at Glasgow, on the 15th October. The confederates were in possession of Glasgow; they got possession of it by fighting; Glasgow was taken at ½ past one on the 15th Oct.; Gen. Clark was in command & held possession till 17th. From noises about the warehouse and all along that road, I would say there was a considerable commotion; the two houses were nearly consumed before the boat was burned; fire started in warehouse 1½ or 2 hours before boat was burned. Heard Gen. Shelby remark that he came to take the city, not to burn houses; at the time of the fire the society of Glasgow were frightened into quietness; the confederates had no opposition & were therefore quiet, the Federals were taken prisoners & the citizens I did not know where they were.

ALEX. CROFF states:

On 15th, 16th, & 17th Oct., '64, I was in Glasgow; Lewis' warehouse is in the limits of the city & in edge of Chariton Co. ¼ mile from main part of city; Gen. Clark with 1,000 or 1,500 men had possession of the city on the day the warehouse was burned; about 11 o'clock I walked up to ferry, & on my return I passed 15 or 20 confederate soldiers lying down 15 or 20 steps from warehouse; at north end one was standing at middle door with musket in hand, I walked as though I was going to pass between him and house, & he halted me & asked me if I was citizen or soldier; told him I was citizen, he said walk around between him and river, he allowed no one to go in warehouse. The' was small fire in 10 steps of house between warehouse & river, & some children sitting around it. I passed 'cross creek & met 5 or 6 soldiers setting on island, on sod; I passed them and went to the mill & sat on log about 15 minutes, with back towards warehouse; when I got up to leave I discovered a smoke at warehouse; when I got on hill saw tremendous flame bursting out west door; the 5 or 6 soldiers were between 50 & 100 y'ds from warehouse when I saw the smoke; I could see the 6 soldiers sitting there quietly with muskets in their hands; could not see any at warehouse for the smoke; fire occurred between 12 & 2 o'clock; at the ferry soldiers were crossing; I went up in town & saw no one for an hour, except one man I did not know; I was in the city taking care of the dead & taking care of the wounded from the battle. Till confed-
23 erates left, the confederates had entire control of town & whole surrounding country; saw no effort made to extinguish fire; the reason was the confederates did not allow any one to pass about there without a pass; I knew Col. Jackson & Green; Gen. Clark was across the river when fire occurred, as some soldiers said at the ferry he had just crossed; I had got permission of confederate officer, (commissioned) to go to river to see Gen'l Clark. The warehouse was burned first, for I saw the *the* steamboat lying at wharf when I was passing warehouse on my return. Saw none of the citizens stirring about—not one; saw no one till I got to hospital.

Capt. CAPP:

Saw great many confederate colonels & officers; I suppose there were

2,000 soldiers, & about 1,500 of them organized; all was quiet at time I first saw the fire.

EDWARD HUMPHREY states:

In fall of 1864, I resided in east addition to Glasgow; was there at the battle; was there when Lewis' warehouse was burned; whilst the battle was going on the citizens *was* concealed; when the fight first commenced I was out & saw it; there were several rebel soldiers about my house, broke in the kitchen door to get something I suppose for the sick; this was Saturday—Sunday they still occupied Glasgow; Monday the warehouse burned; I saw it from a distance; I saw the smoke, & went on the hill to see what house it was, (on Seminary Hill;) saw men around warehouse whilst it was burning; could not see whether they had arms in their hands or not; warehouse burned Monday between 12 & 1 o'clock or earlier. The rebels were crossing the river both before and after the burning of the warehouse; no effort was made to extinguish the fire; there were 30 or 40 men walking about the warehouse whilst it was burning; I saw the s'boat burning. The reason I did not try to put out the fire was I did not think it advisable to go there; I had heard the rebels were pressing men into the service, and I did not suppose I would be permitted to put it out; I was at home, which is a ¼ mile from warehouse; when fire first broke out I went to the hill, which is half way between, to see; then it was in flames.

LEWIS THIXTON states:

Was in Glasgow in 1864 at time of the battle; was in my own yard
24 all the time of the battle. The rebel conquered and took the city & remained in occupation from Saturday till Monday; saw the warehouse burn from my house; it burned between 12 & 2 o'clock; the house was burned before the s'boat.

GEORGE TATUM states:

In Oct. '64 resided in Glasgow; saw the warehouse burning. Whilst I was engaged in throwing water on the houses near the fire to prevent them from ketching fire, some one told me I had better look after my own house & I then went up to it very fast. I there saw rebel soldiers; saw the officer who was in the command of the guard acting as police force on horseback with a squad of 20 men, his soldiers. Heard him enquire who it was that was talking of setting fire to the warehouse. Said, Show him to me & I will shoot him; he rode up and dismounted. Lewis' warehouse was then burning; he rode up in a hurry and dismounted; there were several women around the warehouse, seemed to be frightened; it was one of these women who told me to go to warehouse; several women were there greatly excited; seemed to be apprehensive that the town would be burned. There were about 50 soldiers in and around the warehouse; when I got there they had broken open the door, I suppose on Saturday before, and were helping themselves to whiskey, oysters, &c. A steamboat had been unloaded & the goods from it put in there.

H. H. SHEPPERD states:

I was in Glasgow at the battle, & was in a cellar till after the surrender, & then came out; saw the smoke of the burning warehouse *which was* 11 or 12 o'clock Monday; about 10 o'clock a. m. I went up to ferry

& there was a fire about 12 feet from house, a dozen men & some women were around it; there was a flour barrel, both ends out, setting over the fire; the wind was blowing into the warehouse; in passing I had to turn my head on account of the smoke and heat—passing as I did between the fire & house; when I got to Dunnica's house ½ mile off, I saw the smoke from the warehouse; in passing I noticed hemp exposed, that is could see it through the open door, and some household plunder; there was straw scattered round the door.

Reëx:

These men standing around the fire were strangers to me. Don't know if they were armed; I made no attempt to remove the fire
25 or barrel—none of my business to remove fire that other men had made & were warming by it; I supposed these men were confederate soldiers & I did not want to interfere with them; the men all were standing west of the fire; I did not think of any danger to the warehouse & did not till Hutchison———

Ja's Fitzpatrick's testimony.

JA'S FITZPATRICK states:

Was in Glasgow, at battle; saw Gen'l Clark & shook hands with him. I was on the street; saw the boat burned; was doing what I could to keep the house from taking fire. The Lewis warehouse is between the town & upper ferry, where the soldiers crossed, and the road to the ferry was full of soldiers & people.

Depositions of Tilly Emerson read.

Dep. T. Emerson.

GLASGOW, MO., *Dec. 3d*, '64.

I, Tilly Emerson, a citizen of Chariton Co., Mo., residing about one mile north of Glasgow, Howard Co., Mo., was, on the morning of the 17th Oct., 1864, passing from my house to Glasgow, in my buggy, & when ab't 200 y'ds above (on north) of the Lewis warehouse, I saw a crowd of rebel soldiers & women & children congregated about the said warehouse. These rebel soldiers belonged to Gen'l Clark's command, & were passing in and out & around about the said warehouse freely. While sitting in my buggy, talking with one of these soldiers, I asked him what was the occasion of such a crowd about the warehouse. He replied that "directly you (I) would see hell to play there; they were going to burn that warehouse." This was, as nearly as I can reccol'ect, his own language. Not more, I think, than five minutes had elapsed before I saw that the building was on fire, & was soon entirely consumed, with its content'. I understood at the time that these women above spoken of were hangers-on to this rebel army for the purpose of securing what they could of the goods taken by the rebel soldiers from the warehouse. I do not know that the burning of the warehouse was caused by any outside fire said to have been built by the soldiers. It may have been, but my impression is, that the warehouse was deliberately & purposely fired by rebel soldiers. And this I believe to have been the impression of those then present. I so heard understood at the time. The feeling existing in the rebel army among the sol-
26 diers towards B. W. Lewis, the owner of this warehouse, was certainly strong against Mr. Lewis. I conversed freely with the

rebel soldiers, & had opportunity of knowing this to be the case. Many of these soldiers were drinking, and acting in a violent manner.

TILLY EMERSON.

SALLY A. DOWTHITT, of lawful age, being produced, sworn, and examined, on the part of the defendant, deposeth and saith as follows:

I am forty-four years of age, and reside in the county of Lafayette, about three miles from the city of Lexington. In the fall of the year 1864, in the month of October, I was in the town of Glasgow, in Howard County, Mo. At that time I was living in the town of Fayette, in said last-named county. When I reached the town of Glasgow, the confederate forces, a portion of Gen'l John B. Clark, jr'., command, were in the possession of the town, having captured it. This was on Monday, after the surrender of the town, the surrender taking place on the Saturday previous. It was about ten o'clock on Monday when I reached the town, and some of the soldiers had been crossing from the town to the southern side of the Missouri. In going to, and returning from, the town of Glasgow, I passed and repassed confederate soldiers on picket duty. I left the town or its suburbs at about three o'clock that day. While I was in the said town of Glasgow, I saw a frame warehouse on fire. I was about twenty yards distant from said warehouse when I discovered it was on fire. The warehouse referred to by me was situated on the Missouri River, close to the river, and near the ferry, just above the town. At the time I first discovered the fire, the confederate soldiers were in and around and near the said warehouse. I saw hemp and furniture in the warehouse at the time it was burned. When I first passed this warehouse I saw no fire, but about five minutes afterwards I saw the smoke arising from it, and saw confederate soldiers passing in and out of said warehouse at the time I discovered the smoke. Before I saw the house on fire I saw a confederate soldier, an orderly, go into this house, and bring out two chairs, and give them to ladies to sit down upon.

27 Question. Did you have any conversation with any of these confederate soldiers or their officers before or at the time of the burning of this warehouse; and if so, with whom, and what was the tenor of said conversation?

(Question objected to by plaintiffs' attorney.)

Answer. I had a conversation with the man I took to be an orderly before and after the burning of this warehouse. This man was dressed in blue clothes, and in my opinion was an officer, from his dress and yellow stripes on his sleeves. I asked him who set the house on fire, and he said, "Some of our boys." I asked him what they did it for, and he said it was "a good Union man's house." I asked him whose house it was, and he said it was Mr. Lewis'. About this time a colonel and major rode up, and said, if they knew who did it, they would have them punished for it. The house was almost burned down at this time. Another house was on fire near this, but the one first spoken of was nearly burned down before the other one was seen by me to be on fire.

(Plaintiffs, by their attorney, object to the whole of the above answer in regard to such conversations, detailing them in answer, and her opinion.)

At the time I first saw the first warehouse spoken of on fire, the confederate soldiers were in possession of said warehouse. There were pickets about and near this warehouse, and were instructed by the orderly spoken of before to let us pass by at the time. I saw the fire. I did not see Gen'l John B. Clark, jr., but was informed that he was on the

south side of the Missouri River. At the time I left the town of Glasgow, all the army had not crossed the river, the pickets hadn't been called in. These men were armed with guns, pistols, and warlike implements, and acted together.

Cross-examined by plaintiffs' attorney:

I did not then, nor do I now, know General John B. Clark personally. I do not know that I ever saw him. I only know that the soldiers spoken of were a part of his army by hearsay. I do not know the number of men under his command. I could see the men that had crossed the river, and were crossing at that time. When I reached the city I think the main portion of the army had crossed the river. Before I
28 reached the town I saw about one hundred men near the landing at Glasgow and warehouse. During the time I was in Glasgow I think I saw as many *men* as one hundred and fifty armed men on that side of the river. I saw no artillery. I do not know on what side General Clark had his headquarters. I knew that these men were confederate soldiers by their uniform and their officers, colonels, &c. I did not see any one set a torch to the house to fire it. I was in my carriage when I passed the warehouse. I went up about half way between the warehouse and the landing, and stopped. I do not think it was longer than five minutes after I passed before I discovered the fire. I heard no order given to set the house on fire. I saw a steamboat burning about a half mile below the landing, after the warehouse was burned down. I do not know whether any citizens or bushwhackers joined the confederate forces at Glasgow or not. There were bushwhackers all around the county that summer before Clark's troops appeared at Glasgow. I did not see any bushwhackers for about two weeks before that time, and for some time after Clark's forces left. I do not know whether it was set on fire, (the warehouse,) or took fire accidentally. The major and colonel who said, if they knew who set the house on fire, that they would punish them, by their inquiries and manner seemed to disapprove of the act; but the orderly, when asked who did it, seemed to laugh, and I did not hear his reply.

(All this answer objected to by def't's attorney.)

Reëxamination:

Prior to the above-mentioned summer Glasgow was in possession of the Federal authorities.

SALLY A. DOWTHITT.

Subscribed and sworn to before me on the day, at the place, and within the hour first aforesaid.

[L S.] XENOPHON RYLAND,
Notary Public.

Ophelia A. Dowthitt.

OPHELIA A. DOWTHITT, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

I live in Lafayette County, near Lexington. I was in Glasgow on Monday after the surrender of the town to the confederate soldier', and I saw the same warehouse spoken of first by Sally A. Dowthitt burnt. It was in October, about eleven o'clock on the Monday referred
29 to. I was in a boat, twenty yards from the warehouse, when I first discovered the smoke issuing from same house. The doors

of said warehouse were opened when I walked by, and I saw confederate soldiers alone in the house, and at the time I passed by said warehouse I saw no fire; but, after going some twenty steps distant, I stopped, and, looking back, I saw the warehouse on fire.

Question by def't's attorney. Whom did you see in this warehouse and about it when you discovered the fire?

Answer. Confederate soldiers.

Please state, if you know, who set this warehouse on fire.

I did not see it set on fire, but I was near enough to see that no one but confederate soldiers were around the house.

In your opinion, state who set this warehouse on fire.

(Question objected to by pl'ff's attorney.)

Answer. It is my opinion that confederate soldiers did it, from seeing them pass in and out and hearing them *hollow* it was all right.

(Answer and reasons objected by plaintiffs' attorney.)

At the time the house was on fire a man approached—one whom I took to be an orderly, from his words and dress. I asked him who set this house on fire, and he said some of our boys did it, saying it was a good Union man's house. It was Mr. Lewis'.

(All this conversation with the supposed orderly objected to by plaintiff's attorney.)

There were rebel pickets around the warehouse, and as we were passing by they halted us, and this officer, the orderly, ordered them to let us pass, and we passed by.

Cross-examined:

I only knew that these soldiers were confederate soldiers from their dress, observations, and the possession of Glasgow at the time, & hearsay. I do not know of my own knowledge, but from what I saw, I am satisfied said warehouse was set on fire by confederate soldiers. I did not see it set on fire. I heard no order to set it on fire. I heard a colonel & major say, who rode up at the time, that the persons setting the house on fire ought to be punished.

Further deponent saith not.

OPHELIA A. DOWTHITT.

Subscribed and sworn to before me on the day, at the place, and within the *house* first aforesaid.

J. S. Dowthitt.

JOSEPH S. DOWTHITT, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

I reside in Lafayette County, Missouri, near the city of Lexing-
30 ton. I was a member of the brigade of Gen'l John B. Clark, jr., of the confederate army in the month of October, A. D. 1864. I was with a portion of this brigade at Glasgow. We captured the town and the Federal forces that were stationed there prisoners.

What was the object of the confederate army in coming to the State of Missouri?

(Question objected to by plaintiffs' attorney.)

I do not know the object, but I know that the confederate army made war upon all Federal soldiers that they met with, and took possession of all Government property belonging to the United States that they could find. The confederate army occupied the town of Glasgow about two days. While I was near said town I saw houses burning during the

engagement. After the most of the troops had left the town and crossed the river to the southern side, I having crossed with some of them, sometime about an hour after having so crossed, I discovered a warehouse on fire. The warehouse referred to is above the town of Glasgow, near the bank of the river, just above the mouth of the creek that empties into the river close by, and some one hundred and fifty yards from the ferry. [It reported that the house burned belonged to Mr. Lewis. I did not know of my own knowledge whose house it was; but from common report and what I heard at Glasgow, I learned that it belonged to a man by the name of Lewis.]

(Statement enclosed in brackets objected to by pl'ff' attorney.)

I was standing on the main bank of the river, on the opposite side, close to the water, when I first discovered the warehouse to be on fire. I was in full view of the warehouse and could plainly see persons standing around and about said warehouse. The persons I saw were, a major part of them, confederate soldiers. They may have been all confederate soldiers. I was a soldier at that time, and could recognize those persons as soldiers, and a part of the confederate forces. I was in the warehouse while on that side of the river, and I saw soldiers passing in and out of said house. My object in going to said house was to get some bacon for the use of the army, and I did get some for that purpose. I saw a steamboat burnt which was lying near the town on the same side of the river, but I don't know burnt it. Our forces were armed
31 with guns, artillery, and other military equipments. These forces were organized, and acted together in concert, and formed a portion of Price's confederate army. At the time the warehouse was burned there were, from what I could see, from *from* one hundred to one hundred and fifty conf't. soldiers around and about the warehouse. I do not know that they were all soldiers. My impression is that the warehouse was burned by said soldiers. My impression was formed from what I saw at the time.

(Impression and reason for it objected to by plaintiffs' attorney.)

Cross-examination:

I saw some house burning in Glasgow during the engagement, before the confederate soldiers entered the town. Very strict orders were given by Gen'l Price whilst on the raid in Missouri, against burning, stealing, and straggling from the commands. This warehouse was burned after the main force had left the town, including artillery, troops, trains, &c. I saw some ladies about the warehouse—three or four—while it was burning—a little while before or after. I do not know by what means the warehouse took fire. I do not but what a portion of the persons referred to about the warehouse were citizens.

D. S. DOWTHITT.

Pl'ff's' evidence in rebuttal.—J. B. Clark, jr.

Plaintiffs' evidence in rebuttal.

Gen'l Clark's depositions read.
(Objected to by def't.)

JOHN B. CLARK, jr., of lawful age, being produced, sworn, and examined, on the part of the plaintiffs, deposes and says:

Ques. 1st. State whether you was at Glasgow, in Howard County, Missouri, on the 15th, 16th, & 17th days of October, 1864, and what

office did you hold in the confederate army, and where do you now reside.

Ans. 1st. I arrived at Glasgow on the morning of the 15th of October, 1864, and remained there until the evening of the 17th of the same month. I was brigadier general in the confederate army. I reside in the city of New Orleans, State of Louisiana.

Question 2nd. Who was in command of the confederate forces at Glasgow on the 15th, 16th, & 17th days of October, 1864?

Ans. 2nd. On the 14th day of October, 1864, I received orders from General Price to move with my own brigade across the Missouri River, at Arrow Rock, and also with 500 men of Jackman's brigade, and with that force attacked Glasgow on the morning of the 15th; and I was in command of all the forces making the attack on the north side
32 of the Missouri River. General Shelby was ordered to coöperate with me with a small force and a section of a battery from the south side of the river. I retained command of all the forces at Glasgow until evacuated on the 17th, between 3 and 6 o'clock in the afternoon of that day, notwithstanding Gen'l Shelby ranked me as a brigadier general in the confederate army. Memory is not clear as to the precise time.

Question 3d. What orders did you give in relation to the burning of houses or other property in or near Glasgow on the days last above-mentioned, viz: 15th, 16th, & 17th days of October?

Ans. 3d. I gave express verbal orders to the officers in my command to prevent the destruction of property of all citizens, and to furnish guards for that purpose when requested by any citizen, with the exception of a steamboat captured in the service of the Federal Army, which I ordered burned. Col. Benjamin W. Lewis applied to me for guards to guard his property. I ordered one of my staff officers to see that the guards *was* furnished. I saw guards standing in fronts of different buildings in town. I also saw guards at the dwelling-house of Benj. W. Lewis.

Quest. 4. What buildings in or near Glasgow, if any, were burned by your orders?

Ans. 4th. There was no building in or near Glasgow burned by my orders at any time.

Quest. 5th. Did you order any property burned, except the steamboat above-mentioned?

Ans. 5th. I did not.

Cross-examined by defendant's attorney.

Cross-ex:

Quest. 1st. When you made the attack on Glasgow, did you capture it?

Ans. 1st. I attacked and captured Glasgow on the 15th of October, 1864, Col. Harding, commanding, surrendering the Federal force, to the best of my recellection, about 2 o'clock in the afternoon.

Quest. 2nd. How long did you keep possession of Glasgow as a military post after you captured it?

Ans. Until the afternoon of the 17th of October, 1864.

Quest. You said you ordered guards furnished Benjamin W. Lewis to protect his property; what property did he want guards for?

Ans. I do not know what property, but saw guards at his dwelling-house.

Quest. Was the steamboat you spoke of burned; if so, at what time?

33 Ans. The steamboat was burned in the afternoon of the 17th

October, 1864. It was burned between three and six o'clock, and don't recollect precisely the hour; it may have been earlier in the day than three o'clock.

Quest. About what time did you in person cross the river that day?

Ans. About three o'clock, as near as I can recollect.

Quest. Was the steamboat burned before or after you crossed the river?

Ans. Immediately after I crossed the river.

Quest. When you in person crossed the river, who did you leave in command of the forces of your brigade on the north side of the river?

Ans. I gave orders to Col. Burbridge to relieve the pickets, and with them cross the river as soon as possible, which he did in a short time after the steamboat was burned.

Quest. Were there any troops of your command left on the north side of the river, after you crossed in person, except the pickets you spoke of?

Ans. There was no organized force, but stragglers to a considerable number, which Col. Burbridge was ordered to send across the river.

Quest. Were the rear guard and pickets the same force?

Ans. The pickets and other guards, when relieved, were formed into rear guard.

Quest. What officer did you order to burn the boat?

Ans. Col. Burbridge was ordered to see that the boat was burned.

Quest. When you gave the order to Col. Burbridge or other office' to burn the boat, did you say to that officer that you desired him to have nothing else burned unless it contained Government property or stores; that you desired all private property to be protected?

Ans. I don't recollect giving any instructions at that time in regard to other property, but if I did it was certainly to that effect. I should have ordered any public stores burned.

Quest. Was Col. Burbridge or any other officer left in command on the north side of the river, after you crossed to the south side in person, authorized by any order from you, or any general order or usage of war, to burn any house containing public stores belonging to the Government of the United States?

34 (The plaintiff' object to the foregoing question as irrelevant and incompetent.)

Ans. I do not remember to have given any order to Col. Burbridge or other officer to destroy any property other than the steamboat, special or general. My opinion is that Col. Burbridge would have been authorized to destroy stores belonging to the enemy.

Quest. When he (Burbridge) or any other officer was left in command on the north side of the river, after you in person crossed to the south side, was he not left as the sole judge of property belonging to the enemy, and what was proper to be done with it?

(Objected to by the plaintiffs as illegal and incompetent.)

Ans. Any officer left on the north side of the river was in frequent communication with me, and was not left the sole judge of what property was to be destroyed as Government property, and should have communicated with me for instructions before destroying.

Quest. When you had the city of Glasgow in your possession, did you assume military possession and protection of it, and did you consider it your duty to protect the private property of the citizens while thus in your possession?

Ans. Immediately after the capture of Glasgow I assumed military possession and control; considered it proper to protect citizens in their

private property, and while in such military occupation used every endeavor for that purpose.

Quest. During the time you were there in military occupation of the city, did it ever become necessary, and was any court of inquiry ordered by you for the purpose of enquiring into depredations committed on private property by your command while in Glasgow?

Ans. I ordered no court of inquiry; *by* my staff officers instructions to see that no property was destroyed, and if any such came to their knowledge, to report it to me.

Quest. In your instructions to your staff officers, did you not say to them that all private property of the citizens was to be respected, but no property was to be destroyed or molested except property belonging to the enemy?

Ans. I ordered each staff officer to take possession of the public or military stores captured, belonging to his department, and in-
35 structed them to destroy such of said public or military stores as could not be removed.

Quest. When you captured Glasgow did you consider you captured all military stores belonging to, or in possession or under control of, the officers of the Government of the United States which were in the city of Glasgow?

(Objected to as illegal and incompetent.)

Ans. By the terms of the surrender all property and military stores other than the private property of soldiers and officers was to be given into my possession, and all that came to my knowledge was taken possession of by my staff officers, and, so far as my knowledge goes, Col. Harding complied with the terms of surrender in that respect. I considered that all property in the possession and use of the Government of the United States in the city of Glasgow was captured and subject to my control as an officer of the so-called Confederate States.

Quest. While you had military possession of Glasgow, and before your picket guard was removed, was there any other fire except the steamboat you spoke of? If so, state what it was, and all you know about it.

Ans. After the occupation of the place, I know of no building destroyed, except a building supposed to be a warehouse, situated on the river above Glasgow, which was destroyed by fire on the afternoon of the 17th day of October, 1864, and a short time previous to the evacuation of the place, and after I had crossed the river in person, said to be the property of B. W. Lewis.

Quest. When you crossed the river in person to the south side, was not Col. Jeffries and a larger portion of his regiment left on the north side?

Ans. I don't think the larger portion of his regiment was, but Jeffries himself might have been. A portion of his regiment had been detailed as guards for the city.

Quest. On the night of the 16th, did not Col. Jeffries camp around contiguous to this warehouse that was burned?

Ans. I think not. Col. Kitchen, with his regiment, was on the bank of the river, contiguous to the warehouse, all the latter part of the night of the 16th, having been sent down to cross the river.

36 Quest. How far is the warehouse below the ferry landing?

Ans. From one to two hundred yards, I suppose, in plain view.

Quest. What time of the morning of the 17th did you go to the ferry?

Ans. Just before daylight on the 17th, and continued at the ferry,

superintending the crossing, until 8 or nine o'clock a. m.; then rode into the town and to the hospital; gone about one hour, and returned to the ferry, and remained there, superintending the crossing, until I crossed myself.

Question. Did you see any confederate soldiers or officers, during the time you were at the ferry, hauling any goods or stores or merchandize of any kind from the house that was supposed to be B. W. Lewis' warehouse, the house that was burned, to the ferry, to be crossed over the river?

(Objected to by plaintiff' as incompetent and irrelevant.)

Ans. I did not.

Ques. Did Gen'l Shelby come over the river, from the south side to the north side, while you were in possession of Glasgow?

Ans. I met him in Glasgow in about an hour after the surrender of Glasgow.

Quest. Did Gen. Shelby assume any command after he came over?

Ans. He did not.

Quest. Did he issue any order to you, as your superior officer?

Ans. He did not.

Quest. Did he demand any of the spoils, arms, or anything else that you had captured, for the benefit of his command across the river?

(Objected to by plaintiff as incompetent and irrelevant.)

Ans. He asked me what disposition I had made of the arms captured. He then asked me where was his share, for his command across the river?

Ques. Did any of his (Shelby's) troops of his command that day come across the river with him?

Ans. His staff and a few men came over with him. He only had a battalion of cavalry and a section of artillery on the south side of the river.

Quest. How many had Shelby in that battalion?

Ans. I don't suppose there was over 150 men.

37 Quest. Do you form your opinion of the number of men, from the fact there was but one battalion, and one section of artillery?

Ans. Yes; a section of artillery is two pieces of artillery.

Quest. How many companies compose a battalion in the confederate service?

(Objected to, as irrelevant.)

Ans. Not less than two nor more than nine companies.

Quest. Were there any of Gen'l Shelby's command on the north side of the river, except those under your command, at the time of the attack?

Ans. There was a company under Capt. John Brinker, and one company under Capt. Williams.

Quest. When your command crossed the river at Glasgow, on the evening of the 17th of October, 1864, was there not a number of troops left on the north side of the river, at Glasgow, or in the neighborhood of Shelby's command?

Ans. I don't know of any; they may have.

Quest. During that day, when your command was crossing the river, did not a number of troops cross, of Shelby's command, promiscuously with yours?

Ans. No command crossed, but I think a few soldiers of Shelby's command crossed.

Ques. Were not you and Shelby recruiting on that day?

(Objected to as irrelevant.)

Ans. We were.

Quest. When the new rec'uits reported to you, you took command of them; when they reported to Shelby, he took command of them?

(Objected to as irrelevant.)

Ans. I believe that was the case.

Quest. During the day of the 17th of October, 1864, before you crossed the river, was not there a number of Shelby's men in Glasgow during that day?

38 Ans. There were a few men belonging to Shelby's command, but no command. I mean by that there was no non-commissioned or commissioned officers in charge of men of Shelby's command, in Glasgow that day, to my knowledge,

Quest. Might they not have been there and you not know it?

Ans. They might.

Quest. You didn't intend to keep Glasgow as a military post, did you?

Ans. No, sir; I did not.

Quest. How long after you captured it until you commenced leaving it?

Ans. Sometime the next day—about the middle of the day.

Quest. Were the commissioned officers in your command dressed in uniform? if so, describe the uniform.

(Objected to as irrelevant.)

Ans. The most of them were dressed in uniform. The 3d lieutenant is the lowest commis*sioner* officer. He has one stripe on the coat collar, as the ensign of his rank; the 2nd has one; the 1st had 2 stripes; captains, 3 stripes; major, one star on the coat collar; lieut. col., 2 stars; col., 3 stars; the color of the coat was of grey cloth.

Quest. On the 17th Oct., 1864, did not a man by the name of Douglass, who claimed to be a colonel in Shelby's command, have a number of men under his (Douglass') command, in Glasgow and at the ferry, and did not Douglas' and the men under his command cross the river that day?

(Objected to as irrelevant.)

Ans. I know a man by the name of Douglass who crossed the river that day with other men; they may have been of his command.

Quest. Was there not a large number of men presented themselves to you in Glasgow as recruits, who had been organized into companies, battalions, and regiments, sometime prior to your getting into the State or coming to Glasgow?

(Objected to as irrelevant.)

Ans. I don't know what time these men were organized, but some companies and small bodies of men made applications to me to cross them, and I had them crossed.

39 Reëxamined by plaintiff:

What command, if any, did the man Douglass, mentioned by you, have in the confederate army?

(Objected to as irrelevant.)

Ans. He was with a body of recruits from this part of the State, that went out with Gen'l Price as their officer, but had no commission in the army, but was recognized as their officer until they were organized.

Quest. What property in or near Glasgow was burned by your order, and what other property destroyed was reported to you as Government property by your officers?

Ans. There was no property burned by my orders, except the steam-

boat. The stores destroyed *was* placed in the steamboat and destroyed with it; there was no other property reported to me as Government property, destroyed.

Quest. What property belonging to the United States or in the possession of the United States, in the city of Glasgow, if any, was not delivered or turned over to you, according to the terms of the surrender?

Ans. I do not know of any property that was not turned over to me.

Cross-examined:

. There at Glasgow, on the 16th & 17th of October, 1864, was not the troops under your command greatly demoralized, and was there existing among them great insubordination and want of discipline?

(Objected to as irrelevant.)

Ans. There was no insubordination, but the soldiers were in a bad state of discipline when not on duty in the field, at the time they were at Glasgow.

Quest. Did they not engage in destruction of private property and robbery in spite of and against the orders and efforts of their officers to permit it?

(Objected to as irrelevant.)

. By the great mass of the soldiers in my command no robberies or depredations on private property were committed; but there were exceptions, who committed robberies and depredations on private property in spite of the efforts of their officers to prevent it.

40 Quest. Were there any robberies or destruction of private property in Glasgow during those two days by the men, in the presence of and against the orders and efforts of their officers?

(Objected to as irrelevant.)

Ans. There was destruction of private property, but no instance came to my knowledge where a soldier, in presence of his officer, refused to desist from the destruction of private property when so ordered. The principal destruction of private property was done immediately after the surrender—before officers or guards could be so disposed as to prevent it.

Quest. After the proper disposition of the pickets and guards, and before your entire command crossed the river, could any body of soldiers have destroyed any considerable amount of property within the city of Glasgow, without the knowledge of some officer of your command?

(Objected to as irrelevant and illegal.)

Ans. Individual soldiers might have destroyed considerable amounts of property beyond the knowledge of any officer, but depredations by bodies of soldiers could not have been committed without coming to the knowledge of some of the officers.

Quest. Could any two or more of soldiers have made a family get out of a two-horse wagon, near this warehouse that was burnt, and have taken the wagon and horses, and used it hauling several loads of goods from the warehouse to the ferry, and then set fire to the house on the 17th day of October, 1864, between 12 and 3 o'clock p. m., without the knowledge of some officer of your command?

(Objected to as illegal, incompetent, and irrelevant.)

Ans. I don't think goods could have been brought to the boat in a wagon and placed on the boat without the knowledge of some officer; but two or more men might have set fire to the warehouse without the knowledge of any officer, or took the wagon from the family without their knowledge.

Quest. Could twenty men have been engaged in firing the and taking the family from the wagon, without the knowledge officer?

41 (Objected to as illegal, incompetent, and irrelevant.)

Ans. It is possible they might, but not probable.

And further this deponent saith not.

JNO. B. CLARK, JR.

Jno. Siebal.

JNO. SIEBAL states:

Was in Glasgow at time of burning house. I passed by house 1 or 1½ *house* before the fire. As I came back I saw fire. When I went up, I went between the fire and river. There were few soldiers around the fire, & some women in the warehouse. As I came back, & got in 100 yards, I saw the fire. I saw one woman come out of house; she had in her hand a carpet, & said there was fire in house.

(D'f't objected to what woman said.)

Did not hear much noise or disturbance at that time. There were only a few men there at that time. There were 8 or 10 men where I was, 100 yards from house; some were in citizens' & some soldiers' clothes, & had guns. No effort was made to put out fire. There was nothing there to put out fire, & in few minutes the flames were over the whole house. The burning of the warehouse seemed to create no excitement.

JAMES DAMERON states:

I had started to Glasgow on Monday; had heard soldiers had left. When I got to ferry there was such crowd I could not pass. Whilst sitting there on horse I saw smoke; saw good many people; suppose they were soldiers passing. I was 200 yards from house. Heard no unusual noise. I rode by close to the house; saw some few men about the house, & a woman & child or two. When I went to warehouse saw 5 there or 6 men. I was little excited; soldiers were passing; saw people taking things out the house. There were a good many people about the warehouse when I first looked down there, whilst I was at ferry, and the house then was on fire. The soldiers coming up the road by the warehouse were many enough to block the way. The fire first begun in house next to river, & communicated to the one across the road. I did not go down to the city, but turned & went home.

And the evidence being closed on both sides, the plaintiff asked the court to give to the jury the following instructions numbered as follows, 1, 2, 3, 4, 5, & 6, to all of which the def't at the time objected, except the first.

42 And the court gave all six of said instructions; to which action of the court in giving said instructions the def'ts at the time objected and excepted.

And the d'f'ts, on their part, asked the court to give the jury the following, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, to all of which instructions the plaintiff objected, except as to the ones numbered 1, 9, & 14, and the court sustained pl'ffs' objections, and refused to give to the jury the instructions 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13; to which action of the court in refusing to give to the jury instructions 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, the defendants at the time objected and excepted.

The jury found a verdict for the plaintiffs.

boat. The stores destroyed *was* placed in the steamboat and destroyed with it; there was no other property reported to me as Government property, destroyed.

Quest. What property belonging to the United States or in the possession of the United States, in the city of Glasgow, if any, was not delivered or turned over to you, according to the terms of the surrender?

Ans. I do not know of any property that was not turned over to me.

Cross-examined:

. There at Glasgow, on the 16th & 17th of October, 1864, was not the troops under your command greatly demoralized, and was there existing among them great insubordination and want of discipline?

(Objected to as irrelevant.)

Ans. There was no insubordination, but the soldiers were in a bad state of discipline when not on duty in the field, at the time they were at Glasgow.

Quest. Did they not engage in destruction of private property and robbery in spite of and against the orders and efforts of their officers to permit it?

(Objected to as irrelevant.)

. By the great mass of the soldiers in my command no robberies or depredations on private property were committed; but there were exceptions, who committed robberies and depredations on private property in spite of the efforts of their officers to prevent it.

40 Quest. Were there any robberies or destruction of private property in Glasgow during those two days by the men, in the presence of and against the orders and efforts of their officers?

(Objected to as irrelevant.)

Ans. There was destruction of private property, but no instance came to my knowledge where a soldier, in presence of his officer, refused to desist from the destruction of private property when so ordered. The principal destruction of private property was done immediately after the surrender—before officers or guards could be so disposed as to prevent it.

Quest. After the proper disposition of the pickets and guards, and before your entire command crossed the river, could any body of soldiers have destroyed any considerable amount of property within the city of Glasgow, without the knowledge of some officer of your command?

(Objected to as irrelevant and illegal.)

Ans. Individual soldiers might have destroyed considerable amounts of property beyond the knowledge of any officer, but depredations by bodies of soldiers could not have been committed without coming to the knowledge of some of the officers.

Quest. Could any two or more of soldiers have made a family get out of a two-horse wagon, near this warehouse that was burnt, and have taken the wagon and horses, and used it hauling several loads of goods from the warehouse to the ferry, and then set fire to the house on the 17th day of October, 1864, between 12 and 3 o'clock p. m., without the knowledge of some officer of your command?

(Objected to as illegal, incompetent, and irrelevant.)

Ans. I don't think goods could have been brought to the boat in a wagon and placed on the boat without the knowledge of some officer; but two or more men might have set fire to the warehouse without the knowledge of any officer, or took the wagon from the family without their knowledge.

Quest. Could twenty men have been engaged in firing the house and taking the family from the wagon, without the knowledge of an officer?

41 (Objected to as illegal, incompetent, and irrelevant.)

Ans. It is possible they might, but not probable.

And further this deponent saith not.

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Jno. Siebal.

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(D'f't objected to what woman said.)

Did not hear much noise or disturbance at that time. There were only a few men there at that time. There were 8 or 10 men where I was, 100 yards from house; some were in citizens' & some soldiers' clothes, & had guns. No effort was made to put out fire. There was nothing there to put out fire, & in few minutes the flames were over the whole house. The burning of the warehouse seemed to create no excitement.

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I had started to Glasgow on Monday; had heard soldiers had left. When I got to ferry there was such crowd I could not pass. Whilst sitting there on horse I saw smoke; saw good many people; suppose they were soldiers passing. I was 200 yards from house. Heard no unusual noise. I rode by close to the house; saw some few men about the house, & a woman & child or two. When I went to warehouse saw 5 there or 6 men. I was little excited; soldiers were passing; saw people taking things out the house. There were a good many people about the warehouse when I first looked down there, whilst I was at ferry, and the house then was on fire. The soldiers coming up the road by the warehouse were many enough to block the way. The fire first begun in house next to river, & communicated to the one across the road. I did not go down to the city, but turned & went home.

And the evidence being closed on both sides, the plaintiff asked the court to give to the jury the following instructions numbered as follows, 1, 2, 3, 4, 5, & 6, to all of which the def't at the time objected, except the first.

42 And the court gave all six of said instructions; to which action of the court in giving said instructions the def'ts at the time objected and excepted.

And the d'f'ts, on their part, asked the court to give the jury the following, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, to all of which instructions the plaintiff objected, except as to the ones numbered 1, 9, & 14, and the court sustained pl'ffs' objections, and refused to give to the jury the instructions 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13; to which action of the court in refusing to give to the jury instructions 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, the defendants at the time objected and excepted.

The jury found a verdict for the plaintiffs.

Thereupon, on the 8th day of June, 1867, the defendants filed their motion for a new trial, which motion was by the court overruled *by the court;* to which action of the court in overruling said motion for setting aside judgement and for new trial, the defendants at the time objected and excepted, & defendants filed affidavit for an appeal, which was granted, (copied on pages 18 & 19,) and now here tenders this their bill of exceptions, and asks that the same may be signed and sealed and made a part of the record in this cause, which is accordingly done.

G. H. BURCKHARTT, [SEAL.]
Judge 2nd Circuit.

And afterwards, on the 28th April, 1868, the following mandate of the supreme court was filed, to wit:

Mandate.

Supreme court of Missouri, January term, 1868.

ELIAS R. BARTON AND SOLOMON C. HUTCHISON, appellants,
vs.
THE HOME INSURANCE COMPANY OF NEW YORK, respondent.
} Appeal from the 4th district court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of an' concerning the premises, do consider and adjudge that the judgement
43 aforesaid, in form aforesaid, by the said district court rendered, be in all things affirmed, and stand in full force and effect.

It is further considered and adjudged by the court that the said cause be remanded to the circuit court of Howard County for further proceedings to be had therein, in conformity with the opinion of this court herein delivered, and that the said respondent recover against the said appellant, his costs and charges herein expended, and have therefor execution.

STATE OF MISSOURI, *ss:*

I, N. C. Burch, clerk of the supreme court of the State aforesaid, certify that the foregoing is a full, true, and complete transcript of the judgement of the said supreme court entered of record at the January term 1868, in the above-entitled cause.

Given under my hand and seal of said court at office in the city of Jefferson, this 13th day of March, 1868.

[L. S.] N. C. BURCH, *Clerk.*

And afterwards, on the 1st day of June, 1868, the following entry was made of record, to wit:

Order filing app. ch'g'n venue.

ELIAS R. BARTON & S. C. HUTCHISON, PLAINTIFF,
vs.
THE HOME INSURANCE COMPANY, D'F'T.

Now, at this day, come the defendant, by its attorney, and files an application for a change of venue in this cause, which application is in the following words and figures, to wit:

Application.

In the circuit court of Howard County, Missouri, June term, 1868.

ELIAS R. BARTON AND SOLOMON C. HUTCHISON, plaintiffs,
against
THE HOME INSURANCE COMPANY OF NEW YORK, defendant.

The defendant in the above-entitled cause comes and makes application to this court for a change of the venue of said case for the following cause, viz: Because that the opposite party (the said plaintiff?) have an undue influence over the mind of the judge of this court, and the defendant therefore believes that they cannot have a fair trial of said case

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45 in the court of the 2nd judicial circuit.

Defendant asks that the venue of the case be changed to some other court where the same cause does not exist, and where a fair trial may be had.

Defendant further states that defendant came to the knowledge of such cause since the adjournment of the last term of this court.

HOME INSURANCE COMPANY,
By C. J. MERTON, *Gen'l Ag't.*

STATE OF MISSOURI, *County of St Louis, ss:*

This affiant, C. J. Merton, for defendant, being duly sworn, on oath states that he is the principal business manager any general agent of defendant, in the State of Missouri, having exclusive charge on the part of defendant of the business involved in this suit; that the facts as stated in the foregoing application of defendant for a change of venue are true; that the opposite party (the said plaintiffs) have an undue influence over the mind of the judge of the 2nd judicial circuit, and therefore, that defendant cannot have a fair trial in the courts of said circuit, and that a knowledge of said cause did not come to said defendant, or its officers or agents, until since the adjournment of the last regular term of this court.

C. J. MERTON.

Sworn and subscribed before me this 29th day of May, A. D. 1868.
[L. S.] SAMUEL C. LAWRENCE,
Notary Public, St. Louis Co., Mo.

And afterwards, to wit, on the 2nd June, 1868, the following order was in said cause:

Order granting change of venue.

ELIAS R. BARTON & SOLOMON C. HUTCHISON, plaintiffs,
vs.
THE HOME INSURANCE COMPANY, D'F'T.

Now, at this day, come again the parties aforesaid, by their attornies,

and the application for change of venue, filed on yesterday, having been heard—

It is ordered by the court that the venue of this cause be changed to Saline County, Missouri.

And it is further ordered by the court that the clerk of this court make out a full and complete transcript of the records and proceedings in this cause, and transmit the same, duly certified, together with all the original papers in the cause not forming a part of the record, to the clerk of the circuit court of Saline County, Missouri.

46 *Certificate to transcript.*

STATE OF MISSOURI,
County of Howard, sct.

I, Charles H. Stewart, clerk of the circuit court in and for the county aforesaid, do hereby certify that the foregoing is a true and complete transcript of the records and proceedings in the cause wherein Barton & Hutchison are plaintiffs, and the Home Insurance Company *are* defendants, as fully as the same now remains of record and on file in my office. I further certify that I have herewith transmitted *herewith* the original papers in said cause, not forming a part of the records of this court to the Saline circuit court.

Given under my hand and the seal of said court at office in Fayette, Sept. 19th, 1868.

[L. S.] C. H. STEWART, *Clk*

In the Saline County *County* circuit court, November term, 1868.

WEDNESDAY MORNING, *November the fourth, A. D.* 1868.

Court met. Present, the honorable John A. S. Tutt, judge; Vincent Bierbower, county attorney, pro tem., and acting circuit attorney; John Wall, sheriff; and Ben. H. Wilson, clerk.

Objections waived.—Order continuing.

BARTON & HUTCHISON, PLAINTIFFS,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT.

Now, at this day, come the parties, by their attorneys, and plaintiffs now waive all objections to any informality to the certificate of the officer to the depositions of Mrs. Vance and plaintiff *has* leave to file other exceptions to depositions at the next term of this court; and defendant also waives all objections to distance of depositions of Jno. B. Clark, jr., and plaintiff waives objections to distance of deposition of Mrs. Vance, and this cause is continued by consent of parties.

In the Saline County circuit court, April term, A. D. 1869.

TUESDAY MORNING, TEN O'CLOCK, *April 27th*, A. D. 1869.

Court met. Present, the Hon. C. P. Townsley, judge; William Warner, circuit attorney; Ben H. Wilson, clerk; and John Wall, sheriff.

47 *Petition for removal.*

Now, at this day comes the defendant, by its attorney, and files its

petition for the removal of said cause to the circuit court of the United States for the district of Missouri, which petition is in the following words and figures, to wit:

To the circuit court for Saline County and State of Missouri, and to the Hon., the judge of said court:

Your petitioner, the Home Insurance Company of the City of New York, and which is, and for more than ten years now last past hath been, a corporation, created by, organized, and existing under the laws of the State of New York, having its principal business office in the said city of New York, and a citizen of said State of New York, respectfully shows to your honor and to this honorable court, that Elias R. Barton & Solomon C. Hutchison, of the county of Howard, in the State of Missouri, and who are, and for the last five years hath been, citizens of the said State of Missouri, on or about the 31st day of August, 1865, commenced against your petitioner, the Home Insurance Company of the City of New York, an action upon contract, and in which cause the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, which is still pending undetermined in this honorable court.

And your petitioner further states, that it has reason to and does believe that, from prejudice or local influence, *she* will not be able to obtain justice in the said State court of Saline County.

And your petitioner hereby asks for and prays for an order removing the said cause for trial into the circuit court of the United States for the districts of Missouri, at the next session and term thereof.

And your petitioner hereby offers good and sufficient surety for your petitioner entering in said circuit court of the United States, on the first day of the next term thereof, copies of the process against your petitioner in said cause; and your petitioner will ever pray.

THE HOME INSURANCE COMPANY,
By W'M A. McLEAN, *Sp'l Ag't.*

STATE OF MISSOURI, *County of Cooper, ss:*

W'm A. McLean, being duly sworn, says that he is the agent of the Home Insurance Company of the City of New York, the petitioner named in the foregoing petition, and that the facts stated therein
48 are true, and that he makes the said petition and this affidavit for and on behalf of said petitioner, The Home Insurance Company of the City of New York, as its agent as aforesaid.

W'M A. McLEAN.

Sworn to and subscribed before me this seventeenth day of April, A. D. 1869. In witness whereof I have hereunto set my hand and official seal the day and year above written.

[L. S.] R. WADESON,
Notary Public.

[Stamped with 5-ct. U. S. R. stamps.]

And on said day the following, among other proceedings, were had, to wit:

BARTON AND HUTCHISON, PLAINTIFFS,
vs.
THE HOME INSURANCE COMPANY, DEFENDANT.

Order granting removal.

Now, on this day, comes the defendant, The Home Insurance Company,

and presents *her* petition for a removal of this cause to the circuit court of the United States for the districts of the State of Missouri, and also tenders a bond according to the statute in such case, which petition and bond, being by the court deemed sufficient, and the security adjudged good, it is ordered by the court that this cause be, and the same is hereby, removed and transferred to the circuit court of the United States for the districts of Missouri; and the clerk of this court is hereby ordered to make out copies of the process in this case and the record and proceedings in said case for the defendant in said cause, in order that the same, together with all the original papers in this cause, not forming a part of the record, including the depositions, may be filed in the circuit court of the United States aforesaid; and it is further ordered by the court that the defendants pay all costs incurred herein at this term of court, including the transcript of the record in this cause.

And the defendant also comes on said day and files its bond, which is in the following words and figures, to wit:

Bond.

Know all men by these presents that we, The Home Insurance
49 Company of the City and State of New York, and Joseph L. Stephens of Cooper County, and State of Missouri, are held and firmly bound unto Elias R. Barton and Solomon C. Hutchison, of Howard County, and State of Missouri, in the penal sum of one thousand dollars, lawful money of the United States of America, to the payment of which sum well and truly to be made to the said Barton and Huichinson, their heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this seventeenth day of April, 1869.

Whereas Elias R. Barton and Solomon C. Hutchinson, above mentioned, on or about the thirty-first day of August, A. D. 1865, commenced an action upon contract, against The Home Insurance Company of the city of New York, in the circuit court for Howard County, in the State of Missouri, which action was subsequently taken by change of venue to the circuit court for Saline County, in said State; and whereas, The Home Insurance Company has filed its written petition in the circuit court for Saline County, State of Missouri, wherein said cause is now pending, for an order for the removal of said cause for trial into the circuit court of the United States for the western district of Missouri, because of the fact that The Home Insurance Company of the City of New York aforesaid, is, and at the time of the commencement of the aforesaid action was, a corporation created by, organized under the laws of the State of New York, and a citizen of said State of New York. And the above-mentioned Elias R. Barton and Solomon C. Hutchinson now are, and at the time of the commencement of said action were, residents and citizens of the State of Missouri.

Now, therefore, the condition of the above obligation is such, that if the said Home Insurance Company, of the city of New York, shall enter in said circuit court of the United States for the western district of Missouri, on the first day of the next session or *time* thereof,
50 copies of the process against it, the said Home Insurance Company of the City of New York, in said cause, so as aforesaid, then, and in that case, the above obligation shall be void; otherwise to be and remain in full force, virtue, and effect.

Witness our hands and seals the day and year above written.

THE HOME INSURANCE COMPANY, [SEAL.]
By W'M A. McLEAN, *Sp'l Ag't*
J. L. STEPHENS. [SEAL.]

Attest:
[L. S.] R. WADESON, *Notary Public.*

Approved April 27th.

CHAN. P. TOWNSLEY.

STATE OF MISSOURI,
County of Saline, sct:

Clerk's certifiate.

I, Ben. H. Wilson, clerk of the Saline County circuit court, do hereby certify that the foregoing is a true and complete copy of the transcript filed in my office in the cause wherein Barton & Hutchison are plaintiffs, and The Home Insurance Company is defendant, together with the proceedings thereon had in the Saline circuit court, as the same remain of record and on file in my office; and I further certify that I have herewith transmitted all papers in said cause, not forming a part of the records of said court, to the circuit court of the United States for the districts of Missouri.

In testimony whereof I hereto sign my name and affix my official seal at office in Marshall, Saline County, Missouri, this 14th day of May, A. D. 1869.

BEN. H. WILSON,
Clerk Circuit Court of Saline County, State of Missouri.

And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis, in said districts, on the first Monday of Oct. A. D.
51 1869, the following proceedings were had in said case on Wednesday, the 13th day of October, in said year, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS, *ag'st* THE HOME INSURANCE COMPANY, DEFENDANTS. } Removed from circuit court of Saline County.

Leave given parties to file declaration and plea.

This day come the plaintiffs, by their attorneys, Messrs. Cline, Jamison & Day, and enter their appearence in this court herein, and also comes the defendant, by its attorneys, Messrs. Sharp & Broadhead, and, by consent of parties, leave is given to plaintiffs to file declaration herein, on or before the first day of January next, and to defendant to reply thereto on or before the first day of March next, and by consent of said parties, it is ordered that this case be now continued until the next term of this court.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case, on Monday, Dec. 27th, 1869, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS,
ag'st
THE HOME INSURANCE CO., DEFENDANT. } Removed from circuit court of Saline County.

Declaration filed.

This day come the parties, by attorneys, and the said plaintiffs, by attorney, file their declaration herein, according to the rules of this court.

Plea of non-assumpsit filed.

To which said declaration, the said defendant, by its attorney, files its plea of non-assumpsit.

The declaration filed as aforesaid, is in the words and figures following, to-wit:

Declaration.

In the circuit court of the United States for the districts of Missouri, October term, 1869.

UNITED STATES OF AMERICA,
Districts of Mo., ss:

ELIAS R. BARTON AND SOLOMON C. HUTCHISON,
vs.
THE HOME INSURANCE COMPANY.

52 And now come the above-named plaintiffs, who are citizens of the State of Missouri, by their attorneys, Cline, Jamison & Day, and by leave of court first in this behalf had and obtained, file this their declaration in accordance with the rules and practice of this court, and complain of the said defendant, a corporation duly organized and established, in accordance with the laws of the State of New York, in a plea of trespass on the case *in* promises. For that wher'as, the said defendant, heretofore, to wit, on the 25th day of August, A. D. 1864, at the district aforesaid, by its policy of insurance, numbered 250, and now here to the court shown, in consideration of the sum of one hundred and twenty-five dollars, paid to the defendant by plaintiffs, who at the time of issuing said policy were, and still are partners in trade and business under the firm-name and style of Barton & Co., did make insurance and cause to be insured the said plaintiffs against loss or damages by fire, to the amount of ten thousand dollars, for the term of three months, from the 25th of August, 1864, at 12 o'clock, noon, to the 25th of November, 1864, at 12 o'clock, at noon, on hemp, stored in a certain one-story frame building belonging to B. W. Lewis, fronting and immediately on the Mo. River, just above Bear Creek, in Chariton County, Mo., the said defendant waiving notice of other insurance, and the said defendant for the consideration aforesaid, did in said policy promise and agree to make good unto the said plaintiffs, their executors, administrators, or assigns, all such loss or damage not exceeding in amount the sum insured as aforesaid, as should happen by fire to the property as above specified, during the three months hereinbefore mentioned, said loss or damage to be estimated according to the actual cash value of the said property at the time such said loss or damage should occur, and to be paid within sixty days after due notice and proof thereof made by the insured in conformity to the conditions an-

nexed to said policy, unless the property should be replaced, by similar property of equal value and goodness, or the company should give notice of their intention to rebuild or repair the damaged premises.

53 And in said policy it was provided and declared that the said company should not be liable to make good any loss or damage by fire which might happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire.

And in said policy it was further provided that if any other insurance had been or should thereafter be made upon said property, and not consented to by said defendant thereon, in writing, or if said property should be sold or conveyed, or the interest of the parties therein changed, or if the said policy should be assigned without the consent of the parties thereon, in writing, or if the insured should make any attempt to defraud the company, then, and in every such case, the said policy should be null and void. And in said policy it was expressed that in case of a loss, the insured should not be entitled to demand or recover on said policy any greater portion of the loss or damage sustained to the subject insured than the amount in said policy insured should bear to the whole amount insured on said property. And plaintiffs allege that there was no other insurance on said property than that covered by said policy, and that no assignment was ever made of said policy, or any part thereof.

And in said policy it was further agreed and declared to be the true intent and meaning of the parties thereto, that in case the said premises at any time during the period for which said policy would otherwise continue in force, should be used for the purpose of carrying on any trade or vocation, or for storing or keeping therein any articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous in the second class of the classes of hazards annexed to said policy, except as in said policy was especially provided for, or should thereafter be agreed by said defendant, in writing, upon said policy, then from thenceforth so long as the same should be so used, said policy should be of no force or effect.

54 And in said policy it was further declared that said insurance was not intended to apply to or cover any books of accounts, written securities, deeds, or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion, &c.; that whenever gunpowder, phosphorus, saltpetre, or any other article subject to legal restriction, should be kept in said premises in larger quantities than allowed by *allowed by* law, or in a manner different from that prescribed by law, unless said use or keeping should be specially provided for in said policy, then said policy should be void; and that if any property covered by said insurance should be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, then the defendant should not be liable therefor, unless fire should ensue, and then for the loss by fire only.

And in said policy it was further expressed that it was made and accepted in reference to the terms and conditions therein contained and thereto annexed, and which are declared to be a part of said contract, and to be used and resorted to in order to determine the rights and obligations of the parties thereto in all case, not otherwise specially provided for in said policy.

And in the said conditions annexed to said policy it was declared that if any person effecting insurance in said company should make any misrepresentation or concealment touching the risk to be assumed, or if,

during the existence of said policy, the risk should be increased by any means within the control of the insured, or by the occupation of the premises for more hazardous purposes than were permitted by said policy, then said policy should be void.

And in said conditions annexed to said policy it was further expressed that persons sustaining loss or damage by fire should forthwith give notice thereof in writing to the company or its agent, and as soon after as possible should deliver as particular an account of their loss and damage as the nature of the case would admit, signed with their own hands; that they should accompany the same with their oath or
55 affirmation declaring the said account to be true and just, showing also the ownership of the property insured; what other insurance, if any, existed on the same property; and giving a copy of the written portion of the policy of each company; what was the whole cash value of the insured property; what was their interest therein; in what general manner, (as to trade, manufactory, merchandise, or otherwise,) the building insured, or containing the subject insured and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe; and they shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that they have, by misfortune and without fraud or evil practice, sustained loss and damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify.

And if required, the accused shall submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and whenever required in writing, the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agents at the office of said company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which
56 may have been lost, mislaid, or destroyed; and shall also exhibit to any person named by the company, and shall permit to be examined by them, any property damaged upon which any loss is claimed, or any property saved which was insured by said policy, and until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, the loss shall not be payable. All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims on this company under this policy.

And in said conditions annexed to said policy it was further expressed that said company would not be answerable for any loss arising from the use of fires in buildings unprovided with a good and suitable stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fire in places where laws and regulations on said subject exist; and in said policy it was further expressly provided that no suit or action of any kind against said defendant for the recovery of any claim upon, under,

or by virtue of said policy, should be sustainable in any court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after any loss or damage should occur.

And plaintiffs say and declare that, on the 17th day of October, 1864, being within the time mentioned in said policy, they were the owners of hemp, stored in the said building, in said policy described, which was covered by the said policy of insurance, and which, at the date last aforesaid, was of the actual cash value of more than ten thousand dollars; and on said day, to wit, on the 17th of October, 1869, at said county of Chariton, in said district, the said hemp stored in said building as aforesaid, was accidentally and by misfortune, and without fraud or evil practice, totally destroyed by fire, whereby the plaintiffs
57 sustained loss and damage in the sum of ten thousand dollars, which was the actual cash value of said hemp at the time it was destroyed as aforesaid; that forthwith after said loss and damage, plaintiffs gave notice thereof to the defendant, and duly performed all the conditions and stipulations in said policy contained on their part to be done or performed in case of loss or damage, and did, as soon as possible after said fire, deliver to defendant a particular account of their said loss & damage, in accordance with the directions and stipulations in said policy, and in all things plaintiffs have performed and fulfilled their part of said contract of insurance, as set forth in said policy and the conditions thereto annexed; and that said loss and damage, or any portion thereof, did not happen by means of the excepted causes enumerated in said policy, and hereinbefore referred to.

And whereas it was provided in said policy of insurance that said loss and damage should be paid within sixty days after due notice and proof thereof, made by the insured as aforesaid; and whereas, proof of said loss or damage was made by the plaintiffs, in accordance with the requirements and stipulations of said policy, on a certain day, to wit, on the 17th day of Nov., 1864; and, although sixty days after the making and delivering of said notice and proof of loss have long since elapsed, and although suit was instituted herein, within twelve months after the occurring of said loss; and although the plaintiffs have duly performed and fulfilled all the stipulations and agreements in said policy contained, on their part to be performed, yet said defendant, though often thereto requested by plaintiffs, on said day of , 186-, as well as at other times, has wholly failed and refused, and does refuse, to pay to plaintiffs, said sum of ten thousand dollars, or any part thereof, to plaintiffs' damage in the sum of fifteen thousand dollars damage; and therefore plaintiffs bring this suit, &c.

CLINE, JAMISON & DAY,
Attorneys for Plaintiffs.

The plea filed by defendant, to the plaintiffs' declaration herein
58 is in the words and figures following, to wit:

Plea of non-assumpsit.

In the circuit court of the United States for the districts of Missouri, October term, 1869.

ELIAS R. BARTON, & SOLOMON C. HUTCHISON, pl'ffs,
vs.
THE HOME INSURANCE COMPANY, DEF'T.

And the said defendant, by its attorney, comes & defends the wrong

& injury, when, &c., and says that it did not undertake & promise, in manner & form as the said plaintiffs have thereof above complained against it; and of this it puts itself upon the country.

SHARP & BROADHEAD,
Att'ys for Def't.

And afterwards, at a regular stated term of said circuit court, to wit, at the April term thereof, A. D. 1870, the following further proceedings were had in said cause on Tuesday, April 19th, A. D. 1870, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS, *ag'st* THE HOME INSURANCE CO., DEFENDANT. } Removed from circuit court of Saline County.

The death of def'd't Hutchison suggested.

This day comes the plaintiff Elias R. Barton, by attorney, and suggests the death, since the last term of this court, of Solomon C. Hutchison, the other plaintiff herein, and asks that this case may proceed in name of him, said Elias R. Barton, as surviving partner and sole plaintiff, which is by the court allowed.

Stipulation of attorneys filed.

Thereupon the parties herein file an agreement, in writing, in relation to certain testimony to be used on the trial of this case.

And the stipulation, filed as aforesaid, is in the words & figures following, to wit:

Agreement.

In the U. S. circuit c't.

It is hereby agreed between the attorneys in the above case,
59 that at the trial thereof, either party may use and read as evidence any of the depositions filed in said case, and also the testimony of any person which is incorporated in a certain bill of exceptions contained in the record in said case; subject, however, to any objection there may be as to the relevancy of any of the evidence in said depositions or bill of exceptions contained. And it is also agreed that, at the trial of said cause, the defendant will either produce the notice of loss, and the proof thereof, served upon it by the plaintiff, or will admit at the trial that the same were made and served upon the defendant, as alleged in the plaintiffs' declaration. It is also admitted the plaintiffs compose the firm of Barton & Co., mentioned in the policy.

SHARP & BROADHEAD,
Att'ys for Def't.
CLINE, JAMISON & DAY,
For Pl'ffs.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun & held as aforesaid, the following further proceedings were had in said cause, on Wednesday, the 20th day of April, A. D. 1870, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS, *ag'st* THE HOME INSURANCE COMPANY, DEFENDANT. } Removed from circuit court of Saline County.

Case heard and submitted to the jury.

This day come the parties, by attorneys, and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come, and thereupon comes said jury, to wit: Alcibiades Murch, Patrick Carrol, Frederick Diehl, James M. Johnson, Leonard Henry, James S. Finley, Newell Ackerman, Benjamin Perkins, James Sweeney, Thomas S. Cunningham, C. Henry Hunker, and Robert McChesney, twelve good and lawful men, who were sworn well and truly to try the issues joined herein, and who, after hearing the evidence and the arguments of counsel, retired to consider of their verdict herein. And said jury thereafter, returned into court the following verdict, to wit:

Verdict.

"We, the jury, find for the plaintiff in the sum stated in the
60 declaration, with interest from the 17th day of Jan'y, 1865, at the rate of six per cent. per annum.

"ALCIBIADES MURCH, *Foreman.*"

Judgement.

It is, therefore, now considered by the court, that the plaintiff, Elias R. Barton, recover against the defendant, The Home Insurance Company of the City of New York, the sum of thirteen thousand one hundred and fifty dollars, being the amount sued for in the declaration herein, with interest thereon, as found by the jury in their verdict aforesaid, and that said plaintiff also recover against said defendant the costs in this behalf expended, and that execution be issued therefor.

And afterwards, at *said* last-mentioned regular stated term of said circuit court, the following further proceedings were had in said case on Thursday, April 21st, 1870, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS,
ag'st
THE HOME INSURANCE CO., DEFENDANT. } Removed from circuit court of Saline County.

Motion for new trial filed.

This day comes the defendant, by attorney, and files its motion, in writing, to set aside the verdict in this case, and grant a new trial, for the reasons and causes in said motion set forth.

And the motion for a new trial filed by the defendant, is in the words and figures following, to wit:

Motion.

UNITED STATES OF AMERICA,
Districts of Missouri:

In the circuit court of the United States for the districts of Missouri.

BARTON & OTHERS
vs.
THE HOME INSURANCE COMPANY OF NEW YORK.

Now comes the said defendant, by its attorney, and moves the court to set aside the verdict in this case, and grant a new trial.

1. Because the verdict was against the evidence.
2. Because the verdict is against the law and the instructions of the court.
3. Because the verdict is uncertain and insufficient; it does not find the amount of damages, nor does it find the facts from which the
61 damages may be ascertained, so that the court can know for what amount the judgment is to be rendered.

SHARP & BROADHEAD,
Att'ys for Def't.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case on Thursday, 12th of May, A. D. 1870, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS,
ag'st.
THE HOME INSURANCE CO., DEFENDANT. } Removed from circuit court of Saline County.

Motion for new trial overruled.

This day come the parties, by attorneys, and the court having examined the motion heretofore filed herein by said defendant to set aside the verdict in this case, and to grant a new trial, and being advised of and concerning the same, doth overrule the said motion.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had on Saturday, May 21st, 1870, to wit:

ELIAS R. BARTON ET AL., PLAINTIFFS,
ag'st
THE HOME INSURANCE COMPANY, DEFENDANT. } Removed from circuit court of Saline County.

Supersedeas granted.

It is ordered that a supersedeas be granted staying all further proceedings upon the judgement heretofore rendered in this case, a writ of error having been allowed to the Supreme Court of the United States, and a bond, with sureties, executed and approved as required by law.

And the appeal bond, referred to in the foregoing order, is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, The Home Insurance Company of the City of New York, as principal, and Robert Campbell and Augustus F. Shapleigh, as sureties, are held and firmly bound
62 unto Elias R. Barton, in the full and just sum of twenty thousand dollars, to be paid to the said Elias R. Barton, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at the April term, 1870, of the circuit court of the

United States for the districts of Missouri, in a suit depending in said court between Elias R. Barton, plaintiff, and The Home Insurance Company of the City of New York, defendant, judgement was rendered against the said Home Insurance Company of the City of New York, and the said Home Insurance Company of the City of New York, having obtained a writ of error of the said court, to reverse the judgement in the aforesaid suit, and a citation directed to the said Elias R. Barton, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Home Insurance Company of the City of New York, shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

HOME INS. CO. OF NEW YORK,
By C. J. MERTON, *Gen'l Ag't.* [SEAL.]
ROBERT CAMPBELL. [SEAL.]
A. F. SHAPLEIGH. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT, *Judge.*

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case on Saturday, May 28th, 1870, to wit:

63 ELIAS R. BARTON ET AL., PLAINTIFFS, *ag'st* THE HOME INSURANCE CO., DEFENDANT. } Removal from circuit court of Saline County.

Bill of exceptions.—Filed.

This day comes the defendant, by its attorney, and files its bill of exceptions in this case, which being examined and approved by the court, is signed, sealed, and ordered to be made part of the record therein.

And the bill of exceptions referred to in the foregoing order is in the words and figures following, to wit:

Bill of exceptions.

United States circuit court, district of Missouri, sct., April term, A. D. 1870.

BARTON & HUTCHINSON, PL'FFS,
THE HOME INSURANCE CO. OF NEW YORK, DE'FT.

Be it remembered that the above-entitled cause coming on to be heard, the plaintiff introduced in evidence policy No. 250; which policy is in the words and figures following, to wit:

Policy.

Stock company. Cash, capital, $2,000,000.

[50-ct. int. rev. stamp.]

HOME INSURANCE COMPANY OF THE CITY OF NEW YORK.

No. 250. $10,000.

By this policy of insurance, The Home Insurance Company, in consideration of one hundred and twenty-five dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure Barton & Co. against loss or damage by fire, to the amount of ten thousand dollars for the term of three months, from the 25 Aug'st, 1864, at 12 o'clock, noon, to the 25 November, 1864, at 12 o'clock at noon, on hemp stored in a certain one-story frame building belonging to B. W. Lewis, fronting and immediately on the Mo. River, just above Bear Creek, in Chariton Co., Mo. Notice of other insurance
64 waived from the 25th day of Aug'st to 25 Nov., 1864.

$10,000 @1¼, $125 00

And The Home Insurance Company above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, their executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured as shall happen by fire to the property as above specified, during three months, to wit, from the 25 day of Aug'st, one thousand eight hundred and sixty-four, at 12 o'clock at noon, until the 25 day of Nov., one thousand eight hundred and sixty-four, at 12 o'clock at noon. The said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen; and to be paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy, unless the property be replaced by similar property of equal value and goodness, or the company have given notice of their intention to rebuild or repair the damaged premises; provided always, and it is hereby declared that this corporation shall not be liable to make good any loss or damage by fire, which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft, at or after a fire; and provided further, that if any other insurance has been or shall hereafter be made upon the said property, and not consented to by this company in writing hereon, or if the said property shall be sold or conveyed, or the interest of the parties therein changed, or if this policy shall be assigned without the consent of the company, obtained in writing thereon, or if the insured shall make any attempt to defraud the company, then, and in every such case, this policy shall be null and void. In case of loss the insured shall not be entitled to demand or recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property; and it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises, at any time during
65 the period for which this policy would otherwise continue in force, shall be used for the purpose of carrying on therein any

trade or vocation, or for storing and keeping therein any articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous, in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing, upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect; and it is moreover agreed and declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to property, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that casts, curiosities, engravings, jewelry, jewels, medals, models, musical and scientific instruments, (piano fortes in dwelling houses excepted,) paintings, patterns, plate, precious stones, printed music, prints, sculptures, statuary, and watches are not deemed to be included in any insurance, unless particularly mentioned in writing in the policy, with specific amounts thereon.

Whenever gunpowder, phosphorus, saltpetre, or any other articles subject to legal restriction, shall be kept in said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void. Petroleum and earth oil, in a crude or unrefined state, are hereby declared uninsurable, and the keeping or storage of the same in the insured premises shall also render this policy null and void. If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor unless fire ensue, and then for the loss by fire only. This policy is made and accepted in reference to the terms and conditions herein contained and hereto annexed, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

66 In witness whereof The Home Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of New York. But this policy shall not be valid until countersigned by Thomson, Lewis & Co., agent of said Home Insurance Company, at Glasgow, Mo.

A. F. WILMARTH,
V. President.

J. H. WASHBURN,
Secretary pro tem.

Countersigned at Glasgow this 25 day of August, 1864.
THOMSON, LEWIS & CO, *Agent.*

Classes of hazards.

FIRST CLASS.

Not hazardous. Staple foreign dry-goods in packages, and staple domestic dry-goods; also, household furniture in dwelling-houses may be insured at 5 cents per $100, in addition to the rate of the building.

Hazardous No. 1. The following articles of merchandise are charged 10 cents per $100 more than the building, but do not increase the rate of the building nor its other contents: Stocks of general dry-goods, cotton batts and wadding; of embroideries and laces; of tailors' goods and

ready-made clothing; also, agricultural implements, boots and shoes, coffee, flour, furs or peltries in packages; glass, (window or plate or looking-glasses,) in boxes; hatters' furs; hardware and cutlery; hides and leather; hops in bales; indigo; iron-ware; metals, (in bars, rods, pigs, or sheets;) paints, paper-hangings; paper in reams; pot, pearl, and soda ashes; rice, salt, spices; straw braid and straw hats in packages, as imported; teas; threshed grain; tin, copper, and sheet-iron ware; tobacco, snuff; whalebone; wine in casks and in glass, in packages.

Extra hazardous No. 1. The following articles of merchandise are charged 20 cents per $100 more than the building, but do not increase the rate of the building or its contents: Artificial flowers and feathers; brushmakers' stock; gas-fixtures; colormen's stock; china, glass, or earthenware, or window or plate glass, or looking-glasses unpacked; fishing-tackle; furs unpacked; liquors and wines in glass, unpacked; musical instruments and printed music; percussion caps; pictures and prints; precious stones; silver plate and plated ware; straw goods; India-rubber hard goods; also, stocks of books, of cabinet ware, of confectionery, of daguerreotype materials, of carriages, of feathers, of jewelry, of watches, of watchmakers' tools, of lamps, of brushes, of millinery, of military goods, of needles, of optical and mathematical instruments, of paper-boxes and band-boxes, of perfumery, of pocket-books, of segars and segar stores, of stationery, of toys, and of fancy goods.

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SECOND CLASS.

Hazardous No. 2. The following trades, occupations, and merchandise add to the rate of the building and its contents 10 cents per $100: Belting and car springs of India-rubber or gutta percha, card printing, china or earthen ware, or glass-ware in boxes, crates, or casks; fire-crackers in packages; flax, hemp, manilla, and sisal grass, and tow in bales; flocks; grocers' stocks; gum shellac; gutta percha and India-rubber manufactured; hat ironing; oil, (fish and vegetable,) provisions, sail-making, spirituous liquors, sugars, sulphur, tallow, wine-dealers' stock, (not including wine in glass unpacked,) wool.

Extra hazardous No. 2. The following articles of merchandise add to the rate of the building and its contents 20 cents per $100: Alcohol, apothecaries' stock, (retail only;) basket-sellers' stock, china or earthen or glass ware or looking-glasses, with privilege of packing or unpacking; cotton in bales; cotton-brokers' samples; drugs, (importers' stocks of, without inflammable acids or phosphorus;) eating-houses, essential oils, gum copal, India-rubber and gutta-percha goods, hay and straw pressed in bundles, manilla and sisal grass unpacked; matches) stocks of) on sale; oakum in bales, oiled clothing, painters' stock, pitch, perfumers' stock, porter-houses, rags in packages, rosin and rosin oil, ship chandlery, turpentine, tar, spirits of turpentine, varnish, wood, and willow-ware.

Extra hazardous No. 3. The following trades and occupations add to the rate of the building and its contents 20 cents per $100: Bakeries with ovens outside the building, and using coal, basket-bleaching, basket-making, blacksmiths' shops, box-repairing workshops, brass-turning or working, carving, charcoal-making, copper-plate printing, daguerreotyping, electro-plating, fringe-making by hand-power, gas-fitting, gilding, gold pen-making, gun-repairing, hat-bleaching, hat-finishing, jewelry manufacturing, lamp manufacturing, liquor-bottling

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establishments, lithographing, map-mounting and varnishing, morocco manufacturing, plumbing and pewtering, printing of newspapers and engravings by hand-power only, pocket-book making, provision warehouses with brick smoke-houses attached, segar-making, silversmithing, tin or sheet-iron or copper working, turning in wood, umbrella manufacturing, upholstering, also private stables.

Specially hazardous. Acids, (nitric, sulphuric, muriatic, and other acids causing ignition,) band-box and paper-box making, bakeries, bark mills, bellows-making, bleaching works, blind-makers' shops, blacksmithing, block and pump making, book-binderies, boat-builders' shops, brass foundries, breweries, brick-yards with kilns, brimstone works, brush manufactories, burning fluid, cabinet-makers' shops, chair-makers' shops, carpenters' shops, candle manufactories, camphene on sale, coppersmiths' shops with forges, coffee and spice mills, chemical laboratories, coach-makers' shops, comb manufactories, confectionery manufactories, coopers' shops, corn-kilns, cotton mills, cotton presses, cotton unpacked, distilleries and rectifying establishments, dying establishments; druggists' stock, (wholesale,) drug and spice mills, ether, fur-dressing establishments, fire-works, fire-work manufactories, flax mills, floor-cloth manufactories, fringe manufactories, fulling mills, flax unpacked, gas manufactories, glass manufactories, grate manufactories, grist or flouring mills, gun manufactories, gunpowder, hat manufactories, hay unpacked, houses building or repairing, hemp unpacked, India-rubber and
69 gutta percha manufactories, hay presses, hemp manufactories, hotels, ink manufactories, iron foundries, ivory black and lamp black manufactories, lamp manufacturing, lime yards and sheds, lime unslacked, livery stables, lumber yards, looking-glass and picture-frame manufactories, machine shops, mahogany yards, malt-houses, matches manufactories, metal mills, musical instruments manufactories, mungo, oiled clothing manufactories, oil mills and manufactories, omnibus stables, plating, plated-ware manufacturing, packing buildings and yards, paper mills, paper-hanging manufactories, percussion-cap manufactories, perfumery manufactories, planing or grooving or molding mills, powder mills, printing of books and job printing, phosphorous, pork-houses, print works, rolling mills, rope and cordage manufactories, rag and junk-shop stock, safe (iron) manufactories, stove manufactories, saltpetre, ships building or repairing, sash-makers' shops, saw-mills, shoddy, smoke-houses, soap manufactories, silversmiths' manufactories, snuff mills, spirit-gas manufactories and spirit-gas on sale, stave yards, steamboats, steam-engines in use, sugar refiners, tobacco manufactories, type and stereotype foundries, tallow-melting establishments, tanneries, tar-boiling houses, taverns, theatres and other places of public exhibition, timber yards, tow unpacked, turpentine distilleries, varnish manufactories, woolen mills, wool waste, wheel-wrights' shops, and generally all work-shops, mills, and manufacturing establishments, and all trades and occupations not above enumerated as hazardous or extra hazardous.

The use of camphene, phosgene, spirit-gas, or burning-fluid, or any other inflammable liquid, as a light, in stores, warehouses, shops, or manufactories, subjects the property insured to an additional charge, and permission for such use must be endorsed, in writing, on the policy. Plate-glass doors and windows, when the plates are of the dimensions of three square feet or more, are subject to an extra premium,
70 and must be seperately and specifically insured. Fences, privies, and other yard fixtures; also store furniture and fixtures, must be seperately and specifically insured.

Conditions of insurance.

1. Applications for insurance on property must be in writing and must specify the construction and materials of the building to be insured; by whom occupied; whether as a private dwelling or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether any manufactory is carried on within or about it; and in relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or specially hazardous, and such survey and description shall be taken and deemed to be a part and portion of the policy issued thereon, and a warranty on the part of the insured.

2. If any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assumed, or if, during the existence of this policy or any renewal thereof, the risk shall be increased by any means within the control of the insured; or by the occupation of the premises for more hazardous purposes than are permitted by this policy; or if the assured at or before the taking of any renewal, shall fail to notify the company of any increase of the hazard, whether within or without the premises, and have the same endorsed hereon, this policy shall be void. Every renewal shall be deemed to be made upon the faith and representation on which the original policy was granted, unless superseded by a new description of the risk.

3. This insurance may be terminated at any time at the request of the insured, in which case the company may retain the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy.

4. If the property to be insured be held in trust or on commis-
71 sion, or be a leasehold or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, with their respective interests therein. Goods held on storage must be seperately and specifically insured.

5. No insurance whether original or continued, shall be considered as binding until the actual payment of the premium.

6. If at the happening of any fire the insured shall have insurance under a floating policy or policies, not specific, but covering goods generally, in various places not designated and yet within limits which include the premises or property herein insured, such policy, as between the insured, and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess.

7. In case of claim for loss or damage on a policy assigned where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or effect whatever, and all liability on the part of this company shall cease.

8. In case of fire, or loss or damage thereby, or of exposure to loss or

damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they shall fail to do so, this company shall not be held liable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood that there can be no abandonment to the insurers of the subject insured.

9. Persons sustaining loss or damage by fire shall forthwith give notice thereof, in writing, to the company, or its agent, and as soon after as possible they shall deliver as particular an account of their
72 loss and damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation declaring the said account to be true and just; showing also the ownership of the property insured; what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and containing the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe. They shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they have by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify.

When merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, seperating the damaged from the undamaged; and shall cause a list or inventory to be made and furnished to the company, of the whole, naming the quantity and cost of each. The amount of sound value and of damage may then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, one-half of the appraisers' fees to be paid by the insurers; and the insured shall, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions
73 touching his, her, or their knowledge of anything relating to such loss or damage or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and whenever required in writing the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also produce certified copies of any bills or invoices of property destroyed or damaged, the originals of which may have been lost, mislaid or destroyed, and shall also exhibit to any person named by the company, and shall permit to be examined by them, any property damaged on which any loss is claimed, or any property saved which was insured by this policy, and until such proofs, declarations, and certificates are produced, and such appraisals and examination of property permitted by the claimant, the loss shall not be

payable. All fraud or attempt at fraud by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

10. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, or to take goods at their appraised value, or to rebuild or repair the building or buildings, within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgement of arbitrators indifferently chosen, whose award in writing as to the amount of such loss and damage shall be binding on the parties, but such awards shall not determine any question as to the liability of this company under this policy.

11. When property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage
74 shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

12. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or of deviation from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist.

13. It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

Stipulation signed by attorneys introduced.

Plaintiff also read in evidence the following stipulation signed by attorneys. (See pages 58 & 59 of this record.)

It was admitted by def't that notice and proof of loss was duly given, and that plaintiffs composed the firm of Barton & Co.

Testimony of Sebree & Rawlins.

Plaintiffs then read in evidence the testimony of John P. Sebree and Jack Rawlins, as preserved in the bill of exceptions, as follows:

(See page 20 of this record.)

Here the plaintiffs closed their case.

The defendant thereupon introduced the following testimony, to wit:

Chester Harding's testimony.

CHESTER HARDING, witness, who testified: that he was in command

of the Federal forces at Glasgow, in October, 1864; that he was compelled to surrender to the rebel forces under General John B.
75 Clark, jr., on the 15th day of October, 1864; that the rebel forces had possession and control of the town of Glasgow, and the surrounding country from the 15th to the 18th of October; the city of Glasgow and vicinity was in the military occupancy of the rebel forces on the 15th, 16th, 17th, & 18th of October, 1864.

Defendant then read in evidence the deposition of Elizabeth Vance, as follows:

Dep. of Elizabeth Vance.

ELIZABETH J. VANCE, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

I am forty-two years old, and reside in Howard County, Missouri. I was in Glasgow in the fall of 1864, when the confederate forces had possession of Glasgow. I was in Glasgow on the Sunday and Monday after the battle at Glasgow, which battle was fought on the 15th day of October, 1864, on Saturday. As I came into town on Monday morning, I met a gentleman as I passed the warehouse, and he asked me if that was Mr. Lewis's warehouse. I told him that they told me it was. He asked me if I wanted anything out of the warehouse; that if I did I had the privilege if now getting, and said that we are now going to burn it. I told him that I did not come to plunder; that I only come to see that that I had never seen. He told me that if I had come to see that, that he would show me what war measures was, or something to that effect; I cannot recollect the precise language. He went then direct to the southwest corner of the warehouse, and went into a crowd of men. I saw him stoop down and seemed to be into a position of kindling a fire. I saw the smoke rise immediately, and saw it when it was no larger than the smoke of a pipe. I rode then across the bridge, and then rode down that little stream opposite the warehouse, and sat on my horse until the warehouse was pretty well burnt down. The stream I crossed was a little creek, a branch that comes into the Missouri River just below the warehouse. There was a sharp crowd
76 of men about the warehouse. I could not tell whether they were confederate soldiers or not. I do not remember whether the crowd of men that were about the southwest corner of the warehouse were armed men or not. When this man said he would show me what war measures was or meant, he said "we are now agoing to burn this house." The confederates claimed to have possession of Glasgow and the ferry when the warehouse was burnt. I don't remember how this man was dressed that said he was going to burn the house. I think it was somewhere between eleven and one o'clock; cannot recollect precisely. I don't know that I was at the warehouse on Sunday. I came to town on Sunday, but made no halt at the warehouse. My attention was not called to the warehouse, but as I went back home there was a great many men about the warehouse and ferry, but I don't know whether they were soldiers or not. The ferry was on the Missouri River, about two hundred yards above the warehouse. The warehouse was on the east bank of the Missouri River, and close to the river. I could not say whether this crowd of men were soldiers or citizens, nor can I say how they were dressed; they were all strangers to me.

Cross-examined by Mr. Shackelford:

There was no man immediately by the side of the man that I met, but there were other men near by. There were crowds of men passing towards the ferry. I do not recollect whether he was armed or not. There was a great many men on both sides of the creek, but I don't know whether they were soldiers or not. The wind and smoke was blowing in the direction of the other warehouse from this one, and as far as I could see the other one caught fire from this. I saw a great many persons, men and women, in town on that day. Many of them I knew, and knew they were citizens; many others I did not know, and don't know whether they were citizens or soldiers.

77 Reëxamined by Judge Clark:

When the man said that we are going to burn the house, I understood him to mean himself and the crowd that he be'onged to. I saw in town on that day Duncan Locke and his wife, old man Younger and his wife. At the time the warehouse was burning I did not see any person about the warehouse that I knew or was acquainted with. These persons I have named were in town.

Re-cross-examined by Mr. Shackelford:

I did not stop at the warehouse as I came in town on the day the warehouse was burnt, only a short time. A short distance on this side of it, when I was talking to the man, as well as I recollect, the door of the warehouse was shut, though my attention was not called to it. I did not see any persons in the warehouse. I never saw any one else have anything to do with the burning, except the one man referred to.

her
ELIZABETH J. + VANCE.
mark.

Dep. Tilley Emerson.

Also the deposition of Tilly Emerson, in words and figures as follows:

TILLY EMERSON, of lawful age, being produced, sworn, and examined, on the part of the defendants, deposeth and saith:

I was on the bank of the river, I think it was Monday, the 17th day of October, A. D. 1864. I was sitting in my buggy some 250 or 300 yards from the warehouse called Lewis' warehouse. There were a great many persons around there, and were making a considerable noise, and shouting or yelling. A man came riding up to where I was from the warehouse. I asked him what was the excitement. He told me there would be hell kick' up there directly. I asked him in what way. He observed the boys or men are going to burn that warehouse in the course of a minute or two. Afterwards he called my attention, saying look there; I told you so; at the same time *time* pointing toward
78 the warehouse. I looked, and saw the warehouse on fire. I think the crowd were confederate soldiers. I did not know the man that rode up to me. I think the man had on a Federal overcoat. I am not positive. I saw the same man go on the boat and cross over with the balance of them. I did not see them take any goods out of the warehouse. There was a great crowd there; the bottom was nearly filled with people. There was a great shouting among them.

(The plaintiff objected to any question being asked as to the conversation said Emerson had with any one.)

Cross-examined:

I know that Barton & Hutchison had hemp stored in the warehouse. I have seen hemp hauled there. I did not see any camp fire between the river and the warehouse. I suppose that a great majority of the confederate soldiers had crossed before the fire occurred. I have no doubt that a number of citizens were in the crowd. There was a good many drunken men in the crowd. When I first saw the fire, the blaze was coming out the top of the warehouse. My back was towards the warehouse. I was sitting in my buggy, and when my attention was called to the fire, I turned and saw the blaze, as above stated.

Reëxamined:

The confederates were crossing at the time the fire took place. I don't know whether the officers were with the soldiers or not. I had a conversation with Col. Burbridge a short time before the fire, but whether he had crossed before the fire took place, I cannot say. I don't recollect the time of day when the fire took place.

Cross-examined:

The men were not in any organized company. The men were passing to and fro—citizens and soldiers. There was a large crowd. It
79 extended from where I was to Bear Creek, below the warehouse. Gen'l John B. Clark, commanding the confederate forces, crossed over the river before the fire took place, but I don't know how long before. I don't think it was *not* more than two or three minute' from the time the man came up to me before I saw the fire. While I was at the same place, the steamboat at the wharf at Glasgow was burnt. I don't recollect which was burned first.

TILLEY EMERSON.

Also the depositions of Martin Green and Ja's W. Lewis, as follows:

Dep. Martin Green.

MARTIN GREEN, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith as follows:

I am forty-three years old, and live in Glasgow. I was at home, in Glasgow; in 1864, when the rebel forces conquered Glasgow. I went to my residence about ten o'clock Monday morning. I laid on the floor, being wounded. About half hour after my attention was called to a smoke by my child. I went to the door and saw the smoke of the warehouse. I remained there for some time, till I saw the flame. About half hour after the wind blew so strong it blew sparks and pieces of wood over on my house. It occupied my time in saving my house during the remainder of the time of the burning of the warehouse. I had never been down to the warehouse while it was burning. It was from one hundred and fifty to one hundred and seventy-five yards from my residence to the warehouse. I could not see whether there were any persons there or not. The town was conquered by the rebels on Saturday the 15th day of October, 1864. The body of the rebel troops crossed the river on Sunday. Recruits were passing on Monday all day. I mean by recruits, for the confederate army. They were dressed in citizens' cloathing. I do not know that I saw any of the regular confederates cross on that day. I do not know Gen'l Clark. I saw no military guards on Monday. I saw nothing I would call a commotion on
80 Monday. I saw from my house on Monday the burning of the

boat at the wharf. I do not know who burned it. I was at my house all day Monday, after my first arrival there that morning. The recruits passed by my house on that day, up towards the ferry over the Missouri River. The' went by the warehouse in passing my residence to said ferry. I saw two or three men at a time, *which* I took for recruits, going up the road towards the warehouse while it was burning. I saw more passing in citizens' cloathes to & fro to the ferry, by the warehouse, while it was burning, reputed to be recruits for the confederate army. I heard a noise at the warehouse while it was burning. I could not tell whether they were men, women, or children. The house was burned from ten to eleven o'clock in the morning. The warehouse was burned before the steamboat was. There were two warehouses burned on that day—the property of B. W. Lewis. The warehouse nearest the river was burned first. I was a prisoner from the time of surrender up to noon on Sunday. I then went to a friend's house in Glasgow and remained there until Monday morning. I then assisted to burry a friend who was killed in the entrenchments; then went home about ten o'clock in the morning. I never heard any of the rebels or rebel officers threaten to burn Lewis' warehouse. Glasgow had been a military station for the Union troops since the year 1862; and Union troops had always been here up to the surrender in 1864. It was about two weeks after the surrender that the Union troops retook possession of Glasgow. While the warehouse was burning, there was a man dressed in citizens' cloathes standing about my stable a short time. He came up and helped to take some furniture out of my house. This man was a stranger to me. I had never seen him before. I have resided in Glasgow from 1861 up to the time of the surrender. I had a general acquaintance with the people of Glasgow—knew nearly all of them. The man that helped to take out my furniture did not live in Glasgow.

81 Cross-examined by Thomas Shackelford, plaintiff's attorney:

I was not near enough to men that were passing to recognize their faces. I heard no noise or confusion before the burning of the warehouse, at or near it. The noise that I heard there was the usual noise that is heard around burning buildings. The second warehouse caught fire from the first, and did not originate separate and apart from the first. The man that was standing at my stable seemed to be dressed in citizens' cloathing. I would take him to be about forty years old. He was standing behind the stable from the warehouse. I travelled up Third-street road; did not go up the river. My house and the warehouse are both out of the city proper, and in North Glasgow, above Gregg's Creek. I could not tell who were recruits or citizens, where I was not acquainted; they were all dressed in citizens' cloathes.

Reëxamined by defend't counsel:

There were no family residences nearer the warehouses than mine. There were no business houses nearer to the warehouse than my shop.

MARTIN GREEN.

Deposition of Ja's W. Lewis.

JAMES W. LEWIS, of lawful age, produced, sworn, and examined on the part of the defend't, deposeth and saith:

I am about forty-seven years old; residence, Chariton County, near Glasgow. I was in Glasgow the day of the batt*el*, on the 15 October, 1864, the day of the surrender of the Federal forces to the rebels. I

am acquainted with the warehouse on the river called the Lewis warehouse. I saw it when it was burning, Monday, about eleven o'clock, a. m., on the 17th October, 1864. I knew what the warehouse contained; Lewis & Bro's had a lot of tobacco in it. W. Heriford had also tobacco in it. A few days before the battle, Gen'l Fisk ordered a steamboat to be unloaded and the goods to be put in the warehouse before alluded to, which was done. The goods taken out the boat and put in the warehouse were of various kinds; consisted of household and kitchen
82 furniture, dry goods or merchandise, bacon, &c., &c., &c.; a lot of hemp belonging to Barton & Hutchison. The Federal authorities placed a sentinal at the *wear*house after Gen'l Fisk had the goods put in there. The Union forces kept a sentinal there until the surrender. At the time I saw the house burning, the rebels had controle of Glasgow and the ferry. At the sight of the house burning, I was just about leaving for the brush to get out of the way of the bushwhackers.

Cross-examined by Thomas Shackelford, for plaintiffs:

If there was any Gover'ment stores in the warehouse, I knew nothing of it. The goods put there from the boat by order of Gen'l Fisk were the ordinary freight the boat was transporting. I reside about a half mile from Glasgow, and about half mile from the warehouse. I was on the hill, three or four hundred yards from the warehouse, when it was burning. I was taken prisoner during the battle, by the rebels. I was released that evening on my parole of honor, and staid all night at my brother's house, who had a guard furnished him by the rebels; returned to Glasgow on Sunday and received a *prole*, with the privilege to go where I pleased, subject to exchange. I was never in Glasgow after that until the Federal troops came into town, which was about two weeks. I think the main body of the rebels were across the river on Sunday; I will not be positive. I think Gen'l Clark himself crossed the river on Sunday evening. The warehouse was under the controle of B. W. Lewis & Bro., but belonged to B. W. Lewis. The rebel guard was at my brother's on Sunday night; I staid there. I do not know when it was withdrawn; I mean the rebel guard. After the town was captured, Gen'l Clark furnished a guard for my brother's dwelling-house. I do not know of his furnishing one for anywhere else. Rebel soldiers had possession of the warehouse; I do not know whether as a guard or not; persons were not allowed to go into it. This was Sunday evening, after the battle, the evening before the house was burned. There was a few
83 regular confederate soldiers about my brother's premises, at the time the warehouse was burned. They were dressed in different garbs, Federal, rebel, & citizens' dress.

Reëxamined by defendant:

The soldiers composing the rebel army were dressed in different garbs; some had on citizens' cloathing; some in confederate uniform; some in Federal uniform. I did not see any one around the warehouse while it was burning. I was in a position I could have seen persons at one end of the house; around the other portion of the house, I could not have seen any person, as the hill intervened.

JA'S W. LEWIS.

Also the deposition of Alex. K. Croff, as follows:

Deposition of Alex. K. Croff.

ELEXANDER K. CROFF, of lawful age, being produced, sworn, and examined on the part of the defendant, states:

My age is twenty-nine years; reside in Salisbury, Chariton County. I was in Glasgow, Howard County, in the fall of 1864, when the rebel army conquered and took possession of Glasgow. I know that Lewis's warehouse was burned down; the battle was fought on Saturday, the 15th of October, and on the Monday following, between 11 o'clock and two, the warehouse was burned. The warehouse was situated on the bank of the Missouri, north of Glasgow, and adjoining its corporate limits. I do not know who burned it. From the town I saw it burning. I was about a quarter of a mile from the house at this time. I couldn't see anybody about the house on account of the smoke. Glasgow, the warehouse, and the surrounding country, at this time, *was* in the possession of the rebels. I saw the warehouse, passing, the morning of the day it was burnt. I saw at this time rebel soldiers standing about there. I supposed they were guarding the house, from their conduct about there. On my return from the ferry on this morning, I passed between the warehouse and the river; when I got opposite the
84 door of the warehouse, a rebel soldier standing there halted me. He asked me if I was a soldier or a citizen. I told him I was a citizen. He then replied, that you can't pass between me and this warehouse. I started around him and got near a fire that was there. He then halted me the second time. He told me to pass around the fire between it & and the river, and I could pass; I did so. This occurred about fifteen or twenty minutes before I saw the house on fire. The fire before spoken of was some thirty or forty feet from the house, and the soldier was standing between it and the house. This warehouse was about two hundred yards below the ferry and between Glasgow and the ferry. At this time the rebel army was crossing at the ferry. They were moving from Glasgow to the ferry. I never saw but one soldier that I knew to be a guard, and he was standing at the warehouse. I saw rebel soldiers along the way to the ferry, however, that I took to be guards. At the time of the fire I heard no noise, confusion, or commotion about the warehouse. I saw the rebel army; the soldiers were dressed in no particular uniform, but every way; some in one costume and some in another.

Cross-examination on behalf of the plaintiffs:

I do not know what was stored in the warehouse. I saw but one soldier guarding the warehouse, and he was at the door on the west side of the warehouse. I saw some soldiers after I crossed the creek, lying around, about fifty yards from the warehouse. I saw no soldiers about the warehouse at the south end; the situation of the warehouse was such that a person could have approached the south end of the warehouse without being visible to the soldier who stood guard at the door at the west side of the warehouse. The wind, I think, was blowing down the river from the northwest. I think the smoke from the fire on the bank of the river blew down the river, and not toward the
85 warehouse. There was a large number of citizens from the surrounding country in town, as well as the rebel soldiers, citizen' were passing to and fro from the ferry to Glasgow by the warehouse, as well as soldiers. I don't recollect whether the main body of the rebel soldiers had crossed the river or not at the time of the fire. At the time I passed the warehouse, and up to the time I saw the fire, there was no noise, confusion, or commosion about the warehouse, that I heard or saw. After I passed, my attention was not attracted to the warehouse until I saw the smoke.

Reëxamined by the defendant:

I think persons might have approached the south end of the warehouse without being seen by the soldiers that were south of the warehouse, as they seemed to be under a bank to shelter from the wind. I don't know what brought the citizens to town, except curiosity to see the rebel army. Gen'l J. B. Clark, jr., was in command of the army; there was no citizen permitted to go in the warehouse that I was aware of; I know of no person being halted and turned from the warehouse except myself.

AL'X. K. CROFF.

Also, the deposition of Colman B. Brown, as follows:

COLEMAN B. BROWN, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

I am thirty-eight years of age, and reside in Glasgow, Howard County, Mo.; I am acquainted with the warehouse of B. W. Lewis, that was burnt down in 1864, having hauled tobacco to it for ten years next before it was burnt; I guess it was thirty-five or forty feet wide, and about a hun-
86 dred feet long; my impression is that it was one long room; there might have been a partition put in it during the war; as I was not in it during the war, I can't say; you could not pass through it with wagons in hauling tobacco; we had to throw it off at the door, and if a rain came up we had to roll it in; it was not a log-house; it was built with posts set in the ground and planked up endwise, and with oak lumber; Mr. Lewis had another warehouse near this, a large one, two log pens, shedded all round, with double doors and a hall going through it, about a hundred feet from the one next to the river, in a northeasterly direction; this house was weather-boarded.

Cross-examined by Mr. Shackelford:

The doors in the warehouse that was burnt were double doors, opposite to each other, or one large door; the opening on each side was eight or ten feet wide; there was also a door in the south end, that was not so large; the eaves of the house were some eight or nine feet high, & the doors extended to the eaves, and I have frequently driven my team inside of the house when it rained, and left my wagon outside and backed out; an empty wagon could go through, but with hogsheads on it could not; a wagon loaded with box tobacco I have frequently driven in and unloaded in the house, but don't know certain whether I have driven through or backed out or not; the doors were of the same height on the east and west side; a covered wagon, such as movers use, could not have gone through without taking down the bows; I saw the warehouse the morning of the same day that it was burnt—about ten o'clock in the morning; the house was then in possession of confederate soldiers; I did not see any movers there; there was a large lot of plunder in there, such as beds, pianos, and chairs and bedsteads; I saw quite a lot of furniture in the house, but did not go in; the soldiers were using
87 the chairs, and other persons that were not soldiers were hauling away the other furniture.

Cross-examined by Mr. Shackelford:

There was no one acting as guards while I was there; there was women from the country at the warehouse; quite a number of citizens were there also, and passing by.

COLMAN B. BROWN.

Dep. of Sallie A. Dowthitt, Ophelia A. Dowthitt, & J. S. Dowthitt.

Also, the depositions of Sallie A. Dowthitt, and the depositions of Ophelia A. Dowthitt and Jasper Dowthitt, except the portions ruled out by the court. (See pages 26, 28, 29, respectively, of this transcript.)

A. Grimshaw's testimony.

Also, the testimony of Addison Grishaw, as preserved in the bill of exceptions on file, as follows: (See pages 20 & 21 of this transcript.)

Ja's Fitzpatrick's testimony.

Also, the testimony of Jas. Fitzpatrick, as preserved in the bill of exceptions on file. (See page 25 of this transcript.)

Deposition of Gen'l Jno. B. Clark.

The plaintiffs, in rebuttal, offered the following testimony: 1. The deposition of General John B. Clark, as follows: (See page 31 of this transcript.

Dep. of Jno. M. Moon.

Also, the deposition of John M. Moon, as follows:

JOHN M. MOON, of lawful age, being produced, sworn, and examined, deposeth and saith:

My age is forty-seven years; residence, Howard County, Missouri; I was in Glasgow on Monday after the battle at Glasgow, in the fall of 1864; the battle took place on Saturday, Oct. 15th, 1864. I was going out between eleven and twelve o'clock with the Third Missouri Regiment, under Col. Green; in passing the warehouse of B. W. Lewis, there
88 seemed to be movers or renters between the two houses in the hall; the doors were large double doors, that wagons could pass through; immediately in front of the hall, between the warehouse and river, there was a fire, not more than fifteen or eighteen feet from the house; I crossed the river in company with Lieut. Allen, of Company G, of the same regiment, and went to his mess and ate dinner, and returned back to the bank of the river, and *see* some one set a barrel, or something that looked like a barrel, over the fire, and in a few minutes the north room of the building took fire, the smoke blowing immediately over that part of the building; I saw some women and children in the hall, and it seemed to be a family; there was considerable wind blowing from the southwest; as I passed by I remarked to some one that if they were not careful they would have a fire; from the position of the fire, and the direction of the wind, the other building took fire from this, as the wind was blowing immediately in that direction.

Cross-examined by Judge Clark:

There *was no* wagons in the hall between the houses; there seemed to be a family camped in the hall, with their bedding; I did not notice any wagons about; I was just riding along with the command, and made no halt; the hall was enclosed with folding doors, that wagons could pass through between the houses; I am confident that wagons could pass through the hall; I should not think the house was more

than twenty-five or thirty feet from the river; the house is composed of the two pens, with a hall between; the side of the house was to the river; I was a soldier in the confederate army; when I made the remark about the danger of the fire, I made it to a soldier that was riding with me; I don't know who put the barrel over the fire, but it was a man, and it looked like a barrel; I was across the river, in Saline County, when I saw what I thought was a barrel put on the fire;
89 I was about fifty yards above the house, and, I think, about four hundred yards from the warehouse.

J. M. MOON.

Deposition of A. A. Pugh.

Also the deposition of Andrew A. Pugh, as follows:

ANDREW A. PUGH, of lawful age, being produced, sworn, and examined on the part of plaintiffs, deposes and says:

I am forty-seven years old; I have resided in Glasgow about twenty-one years. I was in Glasgow the day it was captured by the rebels, on the 15th day of October, 1864. I had a hogshead of tobacco in the warehouse that was burned, which was put in there a few days before it was burned. I do not remember that I was at the warehouse before the fire the day it was burned. At the time the fire started I was standing at my gate, which is four or five hundred yards from the warehouse. I heard the alarm from some quarter—I do not know how. I immediately jumped on my horse and rode up the warehouse as quick as I could, to see if I could get my hogshead of tobacco out. The fire got fairly under way, but had not got to my tobacco; but the flames prevented my doing anything with my tobacco. The fire was on the southwest side of the warehouse—on the side next to the river—the wind blowing up the river from the southwest. Any effort to save the building after I got there would have been unavailing; it seemed to flash like powder. The other warehouse, which was in a northeast course from the one burning, caught fire from the first burning warehouse. There was a lot of rebel soldiers, and women & children, and country people around there. I railed out to some of the rebel soldiers; told them they had no business to set the warehouse on fire; that I had a hogshead of tobacco in there that was worth two or three hundred dollars; that I thought I was as good a southern man as they had in their company. I told them that there were things stored in there be-
90 longing to southern people, that had been taken off the boat. The' said they did not set the warehouse on fire; that it caught from a fire on the bank.

(The conversation between the witness and the soldiers objected to by the defendant's attorney.)

Witness says he saw a fire between the warehouse and the river, west of the warehouse. The fire was made out of chunks & sticks of wood. I do not recollect whether the main body of the rebel troops had crossed the river at that time; they were scattered up and down the river, and going towards the ferry—going from Glasgow to the ferry; the warehouse is between the town and the ferry.

Cross-examination by defendant's council:

The rebel soldiers I saw going from Glasgow to the ferry passed by the warehouse. I am well acquainted with the people in and around Glasgow. I think I knew some of the country people that *was* at the

warehouse when I rode up. I saw Peter Ford and some two or three others I think I knew, about one hundred yards from the warehouse; I saw Cyrus Markland about one hundred or one hundred & fifty yards from the warehouse; these are all the names I now remember. I talked with Markland; this was after I had talked with the rebels. I do not know whether any rebel soldiers camped about the warehouse or not. I do not know who built the fire; I saw some women around it. I took them to be the friends of the rebel soldiers, but do not know who they were. I do not know whether I saw the fire there before that day or not. The goods taken off the steamboat *was* put into the warehouse on my tobacco. When I first saw the fire from my gate I could not see any persons that might have been around the warehouse, from where I was, because a hill intervened. I do not remember that I did or did not see any other persons, but the women around the fire on the
91 bank of the river. The Lewis's had possession of the ware ; I understood they were the owners. My understanding was that the Lewis's were Union men.

A. A. PUGH.

This was all the testimony in the case.

Thereupon the court instructed the jury in regard to the law applicable to the case, and the matter was submitted to the jury. The jury threupon brought in the following verdict, which was received by the court: (See page 59 of this transcript.)

Thereupon the defendant moves to set aside the verdict and grant a new trial, in words & figures as follows: (See page 60 of this transcript.)

Which motion was overruled by the court; and to the action and judgement of the court in overruling said motion the defendant at the time excepted, and prays that this its bill of exceptions may be signed, sealed, and made a part of the record, which is done.

SAMUEL TREAT, *Judge.* [SEAL.]

92 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the records and proceedings in case of Elias R. Barton and Solomon C. Hutchison, plaintiffs, against The Home Insurance Company of New York, defendant, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this ninth day of June, in the year of our Lord eighteen hundred and seventy.

[SEAL.]

BEN. F. HICKMAN,
Clerk of said Court.

93 (Indorsed:) United States circuit court, districts of Missouri. Elias R. Barton et al. against The Home Insurance Company of New York. Duly-certified copy of the records and proceedings in the above-entitled cause.

94 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1870, thereof, between Elias R. Barton, plaintiff, and The Home Insurance Company of the City of New York, defendant, a manifest error hath happened, to the great damage of the said defendant, The Home Insurance Company of the City of New York, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S., Missouri Districts.

Allowed by—

SAMUEL TREAT.

95 In obedience to the within writ of error I hereby transmit to the Supreme Court of the United States a transcript of the record and proceedings in the within-entitled case.

Given under my hand this tenth day of June, A. D. 1870.

BEN. F. HICKMAN,
Clerk U. S. Circuit Court in & for the Districts of Missouri.

96 The United States of America to Elias R. Barton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein The Home Insurance Company of the City of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States for the districts of Missouri, this twenty-

first day of May, in the year of our Lord one thousand eight hundred and seventy.

SAMUEL TREAT.

97 ST. LOUIS, *Oct.* 8, 1870.

I accept service of the within citation.

CLINE, JAMISON & DAY,
Att'y for Def't in Error.

(Indorsement on cover:) No. 332. The Home Insurance Company of the City of New York, plaintiff in error, vs. Elias R. Barton. Missouri C. C. U. S. Filed 5th December, 1870.

Supreme Court of the United States.

DECEMBER TERM, 1871.—No. 132.

THE HOME INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

ELIAS R. BARTON, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

McGill & Witherow, Printers, 1107 E street, Washington, D.C.

Supreme Court of the United States.

DECEMBER TERM, 1871.—No. 132.

THE HOME INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

ELIAS R. BARTON, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

DECEMBER TERM, 1871.

THE HOME INSURANCE COMPANY, OF THE CITY OF NEW YORK, Plaintiff in Error

vs.

ELIAS R. BARTON, Defendant in Error.

No. 132.

ABSTRACT OF CASE.

This is writ of error to the circuit court of the United States for the district of Missouri, and the case is as follows: The Home Insurance Company, by policy countersigned on the twenty-fifth day of August, 1864, insured Barton and Company, defendants in error, against loss or damage by fire, to the amount of ten thousand dollars, for the term of three months, from that day, at twelve o'clock, noon, to the twenty-fifth day of November, 1864, at twelve o'clock, noon, on hemp, stored in a certain warehouse belonging to J. W. Lewis, in Glasgow, Missouri. The policy of insurance contained the following condition:

That the corporation should not be liable to make good any loss or damage by fire, "which may happen by means 'of any invasion, insurrection, riot, or civil commotion, or any military or usurped power," etc. (Record, 44.)

Barton and Company commenced suit in the circuit court for Saline county, Missouri, on this policy, and recovered judgment, which was carried by writ of error to the supreme court of the State of Missouri, and reversed; (Missouri Reports;) and thereupon the insurance company removed the cause into the circuit court of the United

States for the district of Missouri, where new pleadings were filed by order of the court.

The declaration set out the policy with its condition, and averred, that, on the seventeenth day of October, 1864, being within the time mentioned in said policy, plaintiffs were the owners of hemp, stored in said building, of the actual cash value of more than ten thousand dollars; and that, on the 17th day of October, 1864, the said hemp was accidentally and by misfortune totally destroyed by fire, whereby the plaintiff sustained loss and damage in the sum of ten thousand dollars, which was the actual cash value of said hemp at the time aforesaid; *and that said loss and damage did not happen by means of excepted causes enumerated in said policy.*

The defendant filed general issue.

On the trial in the circuit court, the plaintiff offered no evidence tending to show that the fire did not happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

The defendants gave proof, establishing affirmatively beyond question, that the fire did happen by means of an invasion, and that the fire was set by rebel soldiers, or camp followers, while the place was held by military forces commanded by the rebel General, Clark.

The jury found a verdict as follows: "We, the jury, find 'for the plaintiff *in the sum stated in the declaration*, with in-'terest from the 17th of January, 1865, at the rate of six 'per cent. per annum."

Thereupon the court rendered judgment in favor of Barton, against the Insurance Company, for "the sum of '*thirteen thousand one hundred and fifty dollars*, being the 'amount sued for in the declaration herein, with interest 'thereon, as found by the jury in their verdict aforesaid; 'and that the said plaintiff also recover against said defend-'ants the costs in this above expended, and that execution 'be issued therefor." (Record, 41.)

The Insurance Company moved for a new trial upon the following grounds:

"1st. Because the verdict was against the evidence.

"2d. Because the verdict is against the law and the instructions of the court.

"3d. Because *the verdict is uncertain and insufficient.* It does not find the amount of damages, nor does it find the facts from which the damages may be ascertained, so that the court can know for what amount judgment is to be rendered." (Record, 41 and 42.)

This motion was overruled, and the Insurance Company bring the case here by writ of error.

All the evidence is set out in the bill of exceptions. (Record, 60.)

The plaintiff read the policy in evidence, including its specifications, and read stipulations showing proof of loss, and that the plaintiffs compose the firm of Barton and Company, to whom the policy was issued. Plaintiffs then read the testimony of John P. Lebree, and Jack Rawlins, as follows:

"John P. Lebree sworn, and states: There is always a difference in the price of hemp, according to quality. In July and August, 1864, a fair article was worth $153 per ton. After that it got lower. In October it was worth a good deal less, say $125 per ton; a very inferior quality worth much less. The price I name was St. Louis prices. Worth $10 per ton to ship to St. Louis. A fair article worth $115 in Glasgow."

"Jack Rawlins (colored) states: I have been engaged in working in hemp 18 or 20 years; am a good judge of quality of hemp; was foreman for plaintiffs. Half the warehouse was occupied by the hemp; would judge there was 100 tons, and was picked hemp of good quality. Some of the hemp had been in the warehouse the best end of a year, say half of it. As we got hemp we put away the best for winter hackling. It was *baled;* do not know how many *bales* there were. Had put a little hemp in the house two or three weeks before the fire. We were shipping hemp along through the fall; had shipped some a week or two before fire. John Digges hauled

'hemp usually from factory to warehouse. I attended to 'storing it in warehouse."

The defendants thereupon introduced affirmative proof, as follows:

Chester Harding testified that he was in command of the federal forces at Glasgow in October, 1864, and was compelled to surrender to the rebel forces under General Clark, on the 15th of October, 1864; that the rebel forces had possession and control of the town of Glasgow, and the surrounding country, from the 15th to the 18th of October, 1864. (Record, 51.)

The deposition of Elizabeth Vance. (Record, 51.)

The deposition of Tilly Emmerson. (Record, 52.)

The deposition of Martin Green. (Record, 53.)

The deposition of James W. Lewis. (Record, 54 and 55.)

The deposition of Alexander K. Croff. (Record, 55, 56, and 57.)

The deposition of Coleman B. Brown. (Record, 57.)

Also the deposition of Sallie A. Dowthill, Ophelia A. Dowthill, and Jasper S. Dowthill. (Record, 19, 20, 21, and 22.)

Also the deposition of A. Grimshaw. (Record, 15.)

Also the deposition of James Fitzpatrick. (Record, 18.)

After the defendant had rested, the plaintiff read the deposition of General Clark, of the rebel army. (See Record, 22 to 29.)

Deposition of John M. Moon. (Record, 58.)

Deposition of Andrew A. Pugh. (Record, 59 and 60.)

But there is nothing in the testimony offered by the plaintiff in rebuttal which even tends to contradict the positive evidence given by the defendant upon this subject. This is, therefore, a case, not of conflict of proof, but of total absence of proof, on the part of the plaintiff, that the fire did not happen from the causes excepted in the policy, and with affirmative proof, on the part of the defendant, negativing the plaintiff's case, *which proof is uncontradicted on the part of the plaintiff.*

POINTS AND AUTHORITIES.

1. Although the order of a court, denying a motion for new trial, is, ordinarily, not a subject of error, yet, where there is no evidence to sustain the verdict, the denial of a motion for new trial is error, and that is this case.

Conceding, which we do, that the burden of proof was upon the defendant, the insurance company, to show that the fire occurred from causes excepted in the policy, still, the proof offered by the defendant was sufficient to show the fact, and there was no contradictory proof given by the plaintiff. It was, therefore, a case where there was no evidence to sustain the verdict.

MATT. H. CARPENTER,
For Plaintiff in Error.

IN THE

SUPREME COURT of the UNITED STATES.

DECEMBER TERM, 1870.

ELIAS R. BARTON, Surviving Partner,
Defendant in Error,
vs.
THE HOME INSURANCE COMPANY OF N. Y.,
Plaintiff in Error.

RESPONDENT'S STATEMENT AND BRIEF.

This was a suit instituted by the plaiatiff as the surviving partner of the firm of Barton & Co., to recover, under the provisions of a policy issued by the defendant, Barton & Co., for the loss by fire of hemp belonging to the firm. The hemp, at the time of the fire, was stored in a warehouse belonging to B. W. Lewis, in Glasgow, Mo. The policy insured the hemp against loss by fire for the sum of $10,000 for the period of three months from August 25th, 1864, is in the ordinary form, and contains a clause providing "that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power."

The warehouse, together with the hemp, was destroyed by fire on October 17th, 1864.

The only defense made or claimed at the ~~time~~ trial was that the fire took place by means of the excepted causes mentioned in the policy,

and it was contended that the burning of the warehouse was the work of the military power of the rebel forces.

The evidence discloses that the town of Glasgow, which had been in the possession of troops belonging to the Federal army, was, on the 15th of October, 1864, surrendered to a portion of the Confederate forces under command of Gen. John B. Clark, and that from the time of the surrender until the 18th of the same month the rebel forces were in the occupation of the town. It also appears that at, and a short time prior to, the time of the fire there were Confederate soldiers, and also citizens, including a number of women and children, in and about the warehouse. A portion of the evidence tends to show that the fire was the work of some of the soldiers, while other portions tend to prove that it was accidental or arose from some unknown cause. The evidence upon which the defense is sought to be based is contradictory, and fails to give any satisfactory solution as to the origin of the fire, or by whose agency it occurred. And as this Court does sit not to retry issues of facts determined by juries in the Courts below, it would be useless to recite the evidence in detail or to discuss as to which side its weight preponderates.

None of the evidence introduced by the plaintiff was objected to at the trial, and no evidence offered by the defendant was excluded.

The Bill of Exceptions declares that "*the Court instructed the jury in regard to the law applicable to the case.*"

The jury, after hearing the evidence, and the instructions "in regard to the law applicable to the case," returned a verdict for the plaintiff for the amount of the policy and interest. The verdict was as follows: "We, the jury, find for the plaintiff in the sum stated in the declaration, with interest from the 17th day of January, 1865, at the rate of six per cent. per annum."

The judgment of the Court, after reciting the verdict, declares: "It is, therefore, now considered by the Court that the plaintiff, Elias R. Barton, recover against the defendant, the Home Insurance Company of the city of New York, the sum of $13,150, being the amount sued for in the declaration herein, with interest thereon, as found by the verdict aforesaid," &c.

That this verdict was sufficiently definite and certain can hardly admit of a doubt.

Pledger vs. Glover, 2 Porter, 174.
Taylor vs. Rogers, 1 Minor (Ala.), 197.
Cooper vs. Poston, 1 Duvall (Ky.), 92.
Stevens vs. Campbell, 6 Iowa, 538.
Patterson vs. The United States, 2 Wheaton, 225.

The defendant moved for a new trial, on the ground that the verdict was against the evidence and the instruction of the Court, and also that it was uncertain in not finding the amount of the damages.

Thus it will be seen that the plaintiff in error has brought a case before this Court in which there is not a single point of law saved or reserved for its consideration, except the one in reference to the uncertainty of the verdict, which was not urged below, and probably will not be here.

And it will further appear that the Bill of Exceptions is voluminous, incorporating all of the evidence introduced at the trial below, and relating simply to issues of fact which were passed upon by the jury to whom these issues were properly submitted.

And the respondent claims that from an inspection of the record it clearly appears that the writ of error has been sued out in that case purely for delay, and that, under the rules of the Supreme Court (No. 23 relating to interest) he is entitled to damages at the rate of ten per cent. per annum from April 20, 1870, the date of the judgment, until such time as this judgment is paid, which the respondent hereby asks may be allowed him.

F. A. DICK, Attorney for Respondent.

SUPREME COURT OF UNITED STATES.

DECEMBER TERM, 1870.

ELIAS R. BARTON,

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vs.

THE HOME INS. CO. OF N. Y.,

Plaintiff in Error.

STATEMENT AND BRIEF

Of Defendant in Error,

By F. A. Dick.